

EXHIBIT A

VOLUME: I
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

C.A. No. 6:05-cv-424-LED-JDL

ADVANCEME, INC.,)
Plaintiff)
vs.)
RAPIDPAY LLC, BUSINESS CAPITAL)
CORPORATION, FIRST FUNDS LLC,)
MERCHANT MONEY TREE, INC.,)
REACH FINANCIAL, LLC and)
FAST TRANSACT, INC.)
d/b/a SIMPLE CASH,)
Defendants)

C.A. No. 6:06-cv-82-LED

ADVANCEME, INC.,)
Plaintiff)
vs.)
AMERIMERCHANT, LLC,)
Defendant.)

VIDEOTAPED DEPOSITION
OF
THOMAS J. LITTLE, IV
WEDNESDAY, SEPTEMBER 6, 2006

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1 VIDEOTAPED DEPOSITION OF THOMAS J. LITTLE, IV,
 2 taken on behalf of the Defendant, AmeriMerchant,
 3 LLC, pursuant to the applicable provisions of
 4 the Federal Rules of Civil Procedure, before
 5 Denise M. Rae, a Certified Shorthand Reporter
 6 and Notary Public within and for the Commonwealth
 7 of Massachusetts, at the DoubleTree Hotel,
 8 50 Warren Street, Lowell, Massachusetts, on
 9 Wednesday, September 6, 2006, commencing at
 10 9:33 a.m.

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 12 - - - -

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1 ALSO PRESENT:
 2 Ralph Scopa, Legal Video Specialist
 3 David Goldin
 4 Parris Sanz.
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 6 By Mr. Edelman 158
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E X H I B I T S

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2	Magazine entitled "Inc. 500," September, 2006. 11
3	Three-page Curriculum Vitae. 21
4	Document entitled "Little & Company, Member Agreement." 29
5	Letter dated February 17, 1994. 67
6	Three-page photocopy of article entitled "People thought I was nuts." 82
7	Three-page document entitled "Schedule E-1, Demand Promissory Note For Postage Advances." 87
8	Five-page document beginning with Interoffice Memorandum dated January 24, 1990. 100

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<p style="text-align: right;">Page 6</p> <p>1 9 Five-page document entitled "Schedule E-1 Promissory Note for 2 Postage Advances." 111 3 10 Diagram on white board. 114 (Available on videotape only.) 4 11 One-page document entitled 5 "US 6,941,281 B1." 122 6 12 Document entitled "Little & Co., Invalidity Claim Chart, Unites 7 States Patent No. 6,941,281." 123 8 13 Document entitled "Little, Payment Processing Services." 193 9 14 One-page document. 202 10 15 One-page e-mail dated April 26, 11 2006. 234 12 16 Two-page document consisting of e-mails beginning with e-mail dated 13 June 27, 2006. 243 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 8</p> <p>1 Tree. 2 MS. PRESTON: Hilary Preston, also 3 Vinson & Elkins, for the same defendants as 4 Mr. Gray. 5 MR. SCHUURMAN: I'm Bill Schuurman, 6 also representing the same defendants as Mr. 7 Gray. 8 MR. EDELMAN: Michael Edelman from 9 Paul, Hastings for Advanceme. Also here 10 with me, Paris Sanz from Advanceme. 11 - - - 12 THOMAS J. LITTLE, IV, having duly 13 sworn that his testimony would be the truth, 14 the whole truth, and nothing but the truth, 15 testified as follows: 16 DIRECT EXAMINATION 17 by Mr. Gray: 18 Q. Good morning, Mr. Little. 19 A. Hello. 20 Q. Would you please state your name and 21 address, for the record? 22 A. Thomas Little, 1182 Monument Street, Concord, 23 Massachusetts. 24 Q. Okay, and as we go along today, if I ask a 25 question that you don't understand or if</p>
<p style="text-align: right;">Page 7</p> <p>1 At the DoubleTree Hotel, Lowell, 2 Massachusetts: 3 THE VIDEOGRAPHER: Good morning. 4 We are now recording and on the record. My 5 name is Ralph Scopa. I am a legal video 6 specialist working for Veritext New York. 7 Today's date is September 6, 2006. The time 8 is 9:33 a.m. This is the deposition of 9 Thomas Little in the matter Advanceme, 10 Incorporated versus RapidPay, et als., and 11 also, Advanceme, Incorporated versus 12 AmeriMerchant, U.S. District Court, Eastern 13 District of Texas, Tyler Division, Civil 14 Action Numbers 6:05-cv-424-LED-JDL and 15 6:06-cv-82-LED. This deposition is being 16 taken at the DoubleTree Hotel in Lowell, 17 Mass. The Court Reporter is Denise Rae. 18 Counsel will state their 19 appearances and the Court Reporter will 20 administer the oath. 21 MR. SMITH: Neil Smith of Goodwin 22 Procter for Mr. Little. 23 MR. GRAY: Joseph Gray, Vinson & 24 Elkins, on behalf of AmeriMerchant, Reach 25 Financial, First Funds, and Merchant Money</p>	<p style="text-align: right;">Page 9</p> <p>1 you'd like me to repeat a question, please 2 just ask and I'd be happy to do so. 3 A. All right. 4 Q. And to keep Denise -- to stay on Denise's 5 good side, we should both try not to talk 6 over each other. I'll attempt to wait until 7 you finish your answers before I ask another 8 question, and also, if you need a break at 9 any point, just say so and we can stop the 10 deposition and take a break. 11 MR. GRAY: Would you please mark 12 that. 13 (Notice of Videotaped Oral 14 Deposition of Tim Little is marked 15 Exhibit Number 1 for 16 Identification.) 17 Q. I'm handing you what has been marked 18 Little 1, which is a Notice of Videotaped 19 Oral Deposition of Tim Little. Have you seen 20 this Notice of Deposition and the attached 21 subpoena? 22 A. Yes, I have seen the subpoena. 23 MR. SMITH: I don't know if he 24 received the notice. 25 MR. GRAY: Okay.</p>

<p style="text-align: right;">Page 10</p> <p>1 MR. SMITH: He didn't receive the 2 notice. He's seen the subpoena. 3 Q. And you understand that you're here today 4 being deposed pursuant to that subpoena? 5 A. Yes, I do. 6 Q. Have you ever been deposed before? 7 A. Yes. 8 Q. When was that? 9 A. A number of times in various things over the 10 past 30 years. 11 Q. Okay. About how many times? 12 A. Five. 13 Q. Okay, and I'd like to briefly run through 14 your background. Where did you get your 15 undergraduate degree? 16 A. California Institute of Technology. 17 Q. And what was your major? 18 A. Electric -- electronic engineering. 19 Q. Then did you do any graduate work? 20 A. Yes, I did. 21 Q. Where did you go? 22 A. Harvard Business School. 23 Q. And could you tell me where -- who your 24 current employer is? 25 A. Litle & Company.</p>	<p style="text-align: right;">Page 12</p> <p>1 that correct? 2 A. That's right. 3 Q. Have you seen this article before? 4 A. Interestingly enough, these are very hard to 5 come by. This is only the second one I've 6 seen, so -- 7 Q. Have you had a chance to read the article? 8 A. Yes. 9 Q. And does it accurately describe what your 10 company is and your background? 11 A. Yes. 12 Q. Okay. In that article, it mentions, on the 13 next page, it mentions Litle & Company -- 14 sorry, the following page -- which page is 15 that? 92? 16 A. 82. 17 Q. 82. Page 82, it mentions Litle & Company -- 18 another Litle & Company that was sold to 19 First USA in 1995; is that right? 20 A. That's right. 21 Q. And what is the relationship between the 22 Litle & Company that was sold in 1995 to the 23 current Litle & Company? 24 A. There is no relationship. 25 Q. Okay. Were they involved in similar</p>
<p style="text-align: right;">Page 11</p> <p>1 Q. When was Litle & Company formed? 2 A. 2001. June, I think. July, maybe. 3 Q. What is the business of Litle & Company? 4 A. We're in the payment processing business. 5 MR. GRAY: Could you mark this? 6 (Magazine entitled "Inc. 500," 7 September, 2006 is marked Exhibit 8 Number 2 for Identification.) 9 Q. The card payment processing industry, you 10 said? You said the payment processing. Is 11 it card payment processing? 12 A. Yeah. Credit card and debit card and all 13 kinds of cards. 14 Q. Okay. I'm handing you what has been marked 15 Litle 2, which is the September, 2006 issue 16 of "Inc. 500." I've marked two pages. I 17 think it begins on Page 78. 18 MR. EDELMAN: Do you have a copy of 19 that? 20 MR. GRAY: I don't. I just have 21 the original. 22 MR. GOLDIN: It's on the 23 newsstand. 24 Q. The article -- it's an article about you and 25 your company and it ranks you number 1; is</p>	<p style="text-align: right;">Page 13</p> <p>1 business? 2 A. Yes. 3 Q. The card payment processing? 4 A. That's right. 5 Q. So for the rest of the deposition today, I'm 6 going to be asking you questions only about 7 the company that was sent to First USA in 8 1995. 9 A. Right. They did get some of the numbers 10 wrong there. 11 Q. Okay. Which numbers did they get wrong? 12 A. The sale amount. 13 Q. Okay, and so your testimony here today, at 14 least for my questions, will apply only to 15 the Litle & Company that was sold in 1995. 16 MR. SMITH: Okay. So just so the 17 record is clear and so Tim understands, if 18 Mr. Gray refers to Litle & Company, he is 19 referring to the old Litle & Co., which is 20 no longer a company you're affiliated with, 21 and if you need to refer to, either in your 22 answer or you think he's referring to in a 23 question, your current employer, we'll need 24 to designate that as the new Litle & Co. or 25 some other name to differentiate that from</p>

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1 the company that was sold in 1995. Okay?

2 If at any point you're not clear, you can

3 ask me.

4 THE WITNESS: No. That's fine.

5 Q. Okay. When was the old Litle & Company

6 formed?

7 A. In 1986.

8 Q. 1986, and it was sold in 1995?

9 A. That's right.

10 Q. To First USA?

11 A. That's right.

12 Q. And then after that, Chase -- was it

13 Paymentech that bought First USA?

14 A. No. The old Litle & Company was sold to

15 First USA without the ability to use my

16 name. I did not sell my name, so they had

17 two years to change the name and they

18 changed it to Paymentech.

19 Q. Okay. When did you first become involved in

20 the card processing industry?

21 MR. EDELMAN: Objection. Vague and

22 ambiguous.

23 MR. SMITH: You can -- if someone

24 objects, you can answer, unless I instruct

25 you not to answer. So as long as you can

Page 15

1 understand the question as it was phrased,

2 you can answer it.

3 A. In -- around 1982. Within a year of 1982.

4 Q. What were you doing around 1982?

5 A. At that time, my wife and I were running a

6 mail order catalog and we were doing -- she

7 was doing the merchandising and the creative

8 part. I was doing the operations part.

9 Q. Okay. When did card processing become a

10 part of your business?

11 A. When we determined that we had a problem

12 with our card processing and there was

13 nobody to do it properly. There were other

14 reasons, as well.

15 Q. So what did you do first to become involved

16 in the card processing industry?

17 A. I first -- basically, gave our current card

18 processor a hard time because they weren't

19 doing our work the way I thought they should

20 do it, and he basically said "If you're so

21 smart, why don't you do it yourself." That

22 was one of the reasons I got into the

23 business, because the card processors at the

24 time couldn't service direct marketers or

25 what I will call the card-not-present

Page 16

1 industry.

2 Q. What was the name of your catalog company?

3 A. It was called Clymer's of Bucks County.

4 Q. And when you became involved in the card

5 processing industry, did you form a new

6 company?

7 A. Yes.

8 Q. What was the name of that company?

9 A. It was called DMGT, Direct Marketing

10 Guaranty Trust.

11 Q. In what year did you form DMGT?

12 A. I don't really remember exactly. I think it

13 was 1982. Might have been 1983.

14 Q. What sorts of customers did you have for the

15 processing business, DMGT?

16 A. Other catalogs that we knew from being in

17 the industry with our catalog.

18 Q. Did catalog companies supply the products

19 themselves or did they use a fulfillment

20 company to supply the products to customers,

21 to ship the customers products to

22 customers?

23 A. There's several pieces to that question.

24 Did they supply the products. They usually

25 bought products from other people. Most

Page 17

1 catalogs at that time warehoused their own

2 products. Not all did. That was one of the

3 things we had done shortly before is

4 effectively started a full service

5 fulfillment company, which, as far as we

6 know, was the first one that serviced

7 catalogs.

8 Q. So what sorts of customers did you have --

9 did DMGT have at that time?

10 A. They weren't all catalogs, but mostly, they

11 were catalog companies, and they were all

12 card-not-present types of merchants.

13 Q. So for your catalog company customers, did

14 any of them use fulfillment centers to ship

15 products to customers?

16 A. Actually, the first customers we had used

17 us. That was one of the reasons we got into

18 the business, because we had -- we had, all

19 together, including our own catalog, we had

20 14 fulfillment customers and -- of various

21 sorts, but all in the card-not-present

22 business, all direct marketers, and they all

23 used our payment processing service.

24 Q. And what did you say the name of your

25 fulfillment company was?

5 (Pages 14 to 17)

Page 18

1 A. It was called The Back Room.
 2 Q. And was The Back Room related to DMGT?
 3 A. Yes. It had roughly the same ownership.
 4 Not exactly the same ownership.
 5 Q. Was it organized separately?
 6 A. Yes.
 7 Q. How were they organized?
 8 A. I don't understand the question.
 9 Q. Limited partnership or LLC?
 10 A. Oh. It was sub-chapter S.
 11 Q. Both of them were?
 12 A. Yeah. LLC's weren't around at the time.
 13 Q. And they were separate sub-chapter S
 14 companies?
 15 A. Yes, as I remember it.
 16 Q. Okay. Would DMGT ever forward a portion of
 17 card payments due catalog companies to a
 18 fulfillment center?
 19 MR. EDELMAN: Objection. Leading.
 20 A. DM --
 21 MR. EDELMAN: Sorry. It's also
 22 vague and ambiguous. You can go ahead.
 23 MR. SMITH: Would you like to have
 24 the question read back?
 25 THE WITNESS: No.

Page 19

1 A. DMGT did forward the fulfillment -- yeah,
 2 maybe you should read the question back.
 3 MR. SMITH: Can you read the
 4 question back, please, or do you want to
 5 restate it?
 6 Q. I can restate. Did catalog companies have
 7 any obligations to fulfillment companies for
 8 providing the services you've mentioned?
 9 MR. EDELMAN: Objection. Vague and
 10 ambiguous, leading.
 11 MR. SMITH: Do you understand that
 12 question.
 13 THE WITNESS: Yeah.
 14 A. Catalog companies that use fulfillment
 15 centers, instead of doing their own
 16 fulfillment, certainly in our case owed us
 17 money for the services we rendered to them.
 18 We rendered, as I said, services to, all
 19 together, if I remember, 14 direct
 20 marketers. All, but one of them, was really
 21 a catalog company, and those fulfillment
 22 companies owed us money.
 23 Q. How would The Back Room be paid by those
 24 catalog companies?
 25 A. What we did is, the fulfillment -- the DMGT,

Page 20

1 the credit card processing company processed
 2 their credit cards and sent all of the money
 3 that was owed to the merchants directly to
 4 the merchants after deducting the cost of
 5 the services that we charged to the
 6 catalogs.
 7 Q. And where would DMGT forward that portion of
 8 the money?
 9 A. To the bank account that was -- that
 10 involved those kinds -- I guess, in that
 11 case, it was to the bank account that the
 12 fulfillment company operated.
 13 Q. Okay. So in the situation where The Back
 14 Room was a fulfillment company, DMGT would
 15 forward a portion of the card payment to The
 16 Back Room's bank account?
 17 A. That's correct.
 18 Q. And the remaining portion, DMGT would
 19 forward to the catalog company?
 20 A. That's right.
 21 Q. And would this money be electronically
 22 forwarded?
 23 MR. EDELMAN: Objection. Vague and
 24 ambiguous.
 25 Q. How would the money be forwarded?

Page 21

1 A. Either by wire or by using an ACH transfer.
 2 No. At that time, it was all by wire.
 3 Q. What does "by wire" mean?
 4 A. It means using the wire service that the Fed
 5 operates. It's electronic transfer of
 6 money.
 7 MR. GRAY: Please mark that.
 8 (Three-page Curriculum Vitae of
 9 Thomas J. (Tim) Litle is marked
 10 Exhibit Number 3 for
 11 Identification.)
 12 Q. About what time frame were you just giving
 13 testimony about for DMGT in The Back Room?
 14 MR. EDELMAN: Objection. Vague and
 15 ambiguous.
 16 A. It was in the 1982-1983 time frame because
 17 our first customers were our own fulfillment
 18 customers, so it was in that time frame.
 19 Q. And how did the catalog companies accept
 20 credit cards during that time?
 21 MR. EDELMAN: Objection. Leading.
 22 A. When people called in or sent in orders
 23 through the mail, the fulfillment operation
 24 would convert the orders, including the
 25 credit card information, into an order entry

6 (Pages 18 to 21)

Page 22

1 system and they would convert the orders
 2 from the -- that were received by mail into
 3 the order entry system, as well.
 4 Q. So they would input the card number using a
 5 keyboard into a computer?
 6 A. Yeah, along with rest of the order.
 7 Q. I'm handing you what has been marked
 8 Little 3, which appears to be your CV.
 9 MR. SMITH: Did we skip Little 2?
 10 MR. GRAY: No. Little 2 was the
 11 article.
 12 MR. SMITH: Oh, I apologize.
 13 Q. Is that an accurate CV?
 14 A. Yes. It doesn't have the "Inc. 500."
 15 Q. Right, and could you describe -- do you sit
 16 on any boards or have you sat on any boards
 17 in the recent past?
 18 A. Yes.
 19 Q. Which boards have those been?
 20 A. Can I look at this to remember them?
 21 Q. Sure.
 22 A. There's a fairly long list of them on the
 23 second page. I was on some public boards.
 24 I've celebrated getting off my last public
 25 board recently.

Page 23

1 Q. Which board was that?
 2 A. J. Jill.
 3 Q. I see on here a lot of DMA activities and
 4 awards. What is the DMA?
 5 A. The Direct Marketing Association.
 6 Q. What is the DMA Hall of Fame Award?
 7 A. That, I was recognized as having contributed
 8 to the direct marketing industry in a
 9 variety of ways, and that was an award for
 10 that.
 11 Q. In what ways did you contribute or were you
 12 recognized for contributing?
 13 A. Well, there was a whole series of them. I
 14 did a whole lot of work in the privacy area,
 15 did a lot of self-regulation work. I was on
 16 the Ethics Operating Committee, including
 17 Chairman of the Ethics Operating Commit, in
 18 which we attempted to make sure that the
 19 direct marketing industry had a good image
 20 relative to how the direct marketers
 21 conducted themselves ethically. I was on
 22 the DMA's Board of Directors, which
 23 basically ran the Direct Marketing
 24 Association. I'm currently on the Direct
 25 Marketing Education Foundation. I'm a

Page 24

1 trustee. I'm also the -- their secretary,
 2 and that attempts to foster education in
 3 colleges to help students learn direct
 4 marketing, so there are more people that can
 5 come in and work for the companies in the
 6 direct marketing industry, that know what
 7 they're doing.
 8 Q. I also see on your resume, on Page 2, one of
 9 the boards you sit on is the Payment
 10 Processors Association?
 11 A. Yes, that's true.
 12 Q. What is the Payment Processors Association?
 13 A. Well, I guess it's not true any more because
 14 it's basically defunct, but I was involved
 15 with that, and it was a group of payment
 16 processors that were trying to figure out
 17 how to get an association, so that they
 18 would have a little more clout with Visa and
 19 MasterCard.
 20 Q. So they were all -- all the members of the
 21 Payment Processors Association, they were
 22 payment processors?
 23 A. Yes.
 24 Q. Have you ever heard of the CIO 100 award?
 25 A. Yes.

Page 25

1 Q. Have you been awarded that?
 2 A. Recently, yes.
 3 Q. When were you awarded that?
 4 A. Within the last couple of months. I guess
 5 that's not on here either. Maybe it is.
 6 Q. What is the CIO 100 award?
 7 A. It recognizes companies that have
 8 outstanding IT infrastructures and
 9 understanding of how to build systems. It's
 10 normally larger companies, but we were -- we
 11 won the award with Intel and Dell and a lot
 12 of large companies this year. I don't know
 13 if we were the smallest, but we were
 14 probably close to the smallest company.
 15 Q. That's impressive. Okay, for the remainder
 16 of the deposition, I'm just going to be
 17 asking questions about the old Little &
 18 Company, which you said was formed in 1987;
 19 is that correct?
 20 A. '86.
 21 Q. '86, and was sold in 1995?
 22 A. That's right.
 23 Q. Okay. So that time frame is where my
 24 questions are directed. So again, could you
 25 describe, generally, the business of Little &

7 (Pages 22 to 25)

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1 Company in the early 1990's?
 2 A. Litle & Company was the second payment
 3 processor that I started; the first one
 4 being DMGT. My partner in DMGT and I
 5 basically had a falling out, so I had to
 6 start over again. That involved, frankly,
 7 the ethics of using -- mis-using the data,
 8 or at least in my opinion, his desire to
 9 misuse the data. So I started Litle &
 10 Company over again, which was a payment
 11 processor just like DMGT was, except at that
 12 point, we didn't have the catalog or the
 13 fulfillment operation any more. So it was a
 14 pure payment processor. We went out and
 15 sold card-not-present companies and did
 16 their payment processing, which meant we
 17 purchased the transactions from the
 18 merchants and we, in exchange, gave them
 19 the money for the transactions, less a
 20 discount, and that discount was shared
 21 between us, Visa, MasterCard, or other card
 22 company.
 23 Q. And so the discount is what the customer
 24 would pay for having the card transactions
 25 processed by Litle & Company?

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1 MR. EDELMAN: Objection. Leading.
 2 Q. The discount that I was referring to was
 3 what the merchants would pay in order to
 4 participate in the credit card system, and
 5 the merchants were our customers. We
 6 generally refer to our customers as the
 7 customers of the merchant.
 8 Q. Did Litle & Company provide any other
 9 services, other than card processing
 10 services?
 11 A. We-- not in the sense of -- we didn't
 12 provide fulfillment services, or we didn't
 13 -- we weren't a catalog, but we did assist
 14 payment processors -- excuse me. We did
 15 assist merchants with various other kinds of
 16 requirements that they had, and those kinds
 17 of requirements were everything from kind of
 18 special services, we did installment billing
 19 for them, we did consulting services to show
 20 them how to operate their businesses more
 21 efficiently. We did the third party payment
 22 services. We advanced them money for
 23 postage. We were advocates for them when
 24 they got in trouble with Visa and
 25 MasterCard. We helped them with some of

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1 their technical requirements in order to
 2 interface with us. I probably forgot a half
 3 a dozen things that we did, but --
 4 Q. Did you provide any services for credit
 5 arrangements with the merchants?
 6 MR. EDELMAN: Objection.
 7 MR. SMITH: Objection.
 8 MR. EDELMAN: Vague and ambiguous.
 9 A. I don't understand the question.
 10 MR. SMITH: Could you restate the
 11 question?
 12 MR. GRAY: Sure.
 13 Q. If a merchant had an obligation such as --
 14 let me restate. If a company was going to
 15 provide a credit line to a merchant and
 16 required a percentage of the future credit
 17 card transactions, would Litle & Company
 18 ever forward a portion of the payments due
 19 the merchant to that third party?
 20 MR. EDELMAN: Objection. Vague and
 21 ambiguous, leading, calls for a conclusion.
 22 A. I refer to the fact that we did third-party
 23 payments for our merchants and those
 24 third-party payments took various forms.
 25 Typically, the third-party payment that we

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1 made for -- on behalf of a merchant was to
 2 fulfill a merchant's obligations to one of
 3 their suppliers in one form or another. The
 4 supplier could be either a fulfillment
 5 company, it could be a credit facility that
 6 they had, or it could be a postage advance
 7 that we made.
 8 Q. Okay, and we'll go into those each in more
 9 detail, but first --
 10 (Document entitled "Litle &
 11 Company, Member Agreement" is
 12 marked Exhibit Number 4 for
 13 Identification.)
 14 Q. I'm handing you what has been marked Litle
 15 4, which is a Litle & Company Member
 16 Agreement entered into between or among
 17 Litle & Company, National Processing
 18 Company, First National Bank of Louisville
 19 and the undersigned merchant, which is
 20 Museum Publications of America. Have you
 21 seen this Member Agreement before?
 22 A. I wrote most of it.
 23 Q. So you actually drafted this document?
 24 A. That's right.
 25 Q. Could you describe what this document -- the

8 (Pages 26 to 29)

<p style="text-align: right;">Page 30</p> <p>1 agreement that's embodied in this document?</p> <p>2 A. Yes. The relationship of a merchant to a</p> <p>3 payment processor is quite complicated</p> <p>4 because the payment processor has to</p> <p>5 underwrite credit for the merchant, it has</p> <p>6 to provide the merchant funds, it has to</p> <p>7 deal with disputes or help the merchant with</p> <p>8 disputes. It's a complicated relationship,</p> <p>9 and this agreement describes that</p> <p>10 relationship.</p> <p>11 Q. If you look at the first page, which is</p> <p>12 Bates labeled LI00018 -- second page --</p> <p>13 sorry.</p> <p>14 A. Yeah.</p> <p>15 Q. In the left column, third paragraph down it</p> <p>16 says, "Whereas, Litle and NPC are engaged in</p> <p>17 the business of processing paper-based and</p> <p>18 electronic data representing transactions</p> <p>19 conducted through the use of charge cards,"</p> <p>20 do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. Could you describe Litle and NPC's</p> <p>23 relationship?</p> <p>24 A. NPC was at the time the world's largest</p> <p>25 payment processing company that was owned a</p>	<p style="text-align: right;">Page 32</p> <p>1 MR. EDELMAN: Objection. Vague and</p> <p>2 ambiguous.</p> <p>3 A. They were each capable of processing</p> <p>4 payments for merchants. NPC was not</p> <p>5 particularly good, although they could do</p> <p>6 it, of processing card-not-present</p> <p>7 merchants, because it's quite different than</p> <p>8 processing cards where the -- processing</p> <p>9 transactions where the card was present in</p> <p>10 the transaction, and we processed</p> <p>11 card-not-present. They processed</p> <p>12 card-present transactions. The systems are</p> <p>13 different, the rules are different, the</p> <p>14 exposure to fraud is different. So it's two</p> <p>15 quite different businesses. At the time,</p> <p>16 this was just after or shortly after Visa</p> <p>17 and MasterCard changed their rules, such</p> <p>18 that our sponsoring -- our sponsor had to be</p> <p>19 on our contract, or. That was the way that</p> <p>20 it was interpreted at the time. So this was</p> <p>21 a three-party contract when we -- and our</p> <p>22 sponsor had to be a signatory to our</p> <p>23 contract. That was different before this</p> <p>24 time and it's kind of changed since, but</p> <p>25 that's how it worked then.</p>
<p style="text-align: right;">Page 31</p> <p>1 hundred percent by First National Bank of</p> <p>2 Louisville and did no card-not-present</p> <p>3 transactions at all. In order for us to</p> <p>4 participate in the Visa and MasterCard</p> <p>5 networks, we needed a sponsor bank, which</p> <p>6 the technical term for it is an acquirer, an</p> <p>7 acquiring bank, which would be a member of</p> <p>8 Visa and MasterCard. First National Bank of</p> <p>9 Louisville was our sponsor bank. First</p> <p>10 National -- or NPC, National Processing</p> <p>11 Company, that they owned, was where all</p> <p>12 their knowledge of payment processing was</p> <p>13 embodied, and so the people at National</p> <p>14 Processing Company were the ones that</p> <p>15 administrated our contracts and our</p> <p>16 relationship, and in fact, they were also</p> <p>17 officers of First National Bank of</p> <p>18 Louisville.</p> <p>19 Q. So when the document says you're both --</p> <p>20 Litle and NPC are engaged in the business of</p> <p>21 processing paper-based transaction, in</p> <p>22 electronic data representing transactions,</p> <p>23 did each company, Litle and NPC, have a</p> <p>24 network that was used to process the</p> <p>25 transactions?</p>	<p style="text-align: right;">Page 33</p> <p>1 Q. If you look at the same page, LI00018, in</p> <p>2 the left column, under "Definitions,"</p> <p>3 there's a term "bank card."</p> <p>4 A. Right.</p> <p>5 Q. Do you see that? Could you describe what a</p> <p>6 bank card was?</p> <p>7 A. Yeah. It's a card that is issued by either</p> <p>8 Visa or MasterCard.</p> <p>9 Q. And how does a customer -- a customer</p> <p>10 holding a bank card pay for the transaction?</p> <p>11 A. In the card-not-present environment?</p> <p>12 Q. Right.</p> <p>13 A. Typically, at that time, they would call up</p> <p>14 a catalog merchant, a merchant of ours, they</p> <p>15 would say "I want to order something," and</p> <p>16 they would give their credit card number</p> <p>17 over the telephone, their expiration date,</p> <p>18 their name and address, and all the order</p> <p>19 information. At that point, the merchant</p> <p>20 would get an authorization from us to see if</p> <p>21 the credit card could be used for that</p> <p>22 transaction, we'd reply, we'd give them an</p> <p>23 answer, either yes or no. Assuming the</p> <p>24 answer was yes, the merchant would then ship</p> <p>25 the merchandise to the consumer, and at the</p>

<p style="text-align: right;">Page 34</p> <p>1 same time, they would send us a record of</p> <p>2 the transaction, which was basically an</p> <p>3 electronic record sent to us over the</p> <p>4 telephone network or frame relay or</p> <p>5 something, and we would then provide them</p> <p>6 with the face value of the amount of the</p> <p>7 transaction, less a discount, less any other</p> <p>8 charges that were appropriate.</p> <p>9 Q. At that time, how often did Visa and</p> <p>10 MasterCard bill their clients?</p> <p>11 A. Visa and MasterCard doesn't actually bill</p> <p>12 their clients. The card-issuing banks in</p> <p>13 the Visa and MasterCard network bill the</p> <p>14 clients, and those are -- different banks</p> <p>15 have different policies. At the time, I</p> <p>16 think they all billed once a month, but now,</p> <p>17 some of them bill every 22 days or</p> <p>18 something. All of them do things that are</p> <p>19 different.</p> <p>20 Q. And were those all revolving credit, those</p> <p>21 cards?</p> <p>22 MR. SMITH: Objection.</p> <p>23 A. We would actually have no way of knowing.</p> <p>24 At the time, all we knew was a Visa and a</p> <p>25 MasterCard. There were a lot of debit</p>	<p style="text-align: right;">Page 36</p> <p>1 company, there were probably a thousand. So</p> <p>2 in 1992, I guess there were 600, maybe,</p> <p>3 700.</p> <p>4 Q. So Litle & Company was practicing what's</p> <p>5 described in this agreement commercially</p> <p>6 throughout that time?</p> <p>7 A. Yes.</p> <p>8 MR. EDELMAN: Objection. Vague and</p> <p>9 ambiguous as to "that time."</p> <p>10 Q. About how many transactions did Litle &</p> <p>11 Company process at the time it was sold --</p> <p>12 or by the time it was sold in 1995?</p> <p>13 MR. SMITH: Objection. That's a</p> <p>14 vague question. Could you restate that?</p> <p>15 MR. GRAY: Sure.</p> <p>16 Q. How many transactions -- what is your</p> <p>17 estimate of how many transactions Litle &</p> <p>18 Company processed?</p> <p>19 A. I would have to look that up, but it was in</p> <p>20 the billions.</p> <p>21 Q. Again, looking at Litle 4, on Page LI00018,</p> <p>22 in the right-hand column, the very top</p> <p>23 says "charge card." Could you describe what</p> <p>24 a charge card is?</p> <p>25 A. Well, we use "charge card" as the generic</p>
<p style="text-align: right;">Page 35</p> <p>1 cards. I suppose some of them were</p> <p>2 corporate cards. Just all the products that</p> <p>3 Visa and MasterCard had, we could process,</p> <p>4 and we didn't know the difference. In fact,</p> <p>5 Visa and MasterCard, by policy, didn't allow</p> <p>6 people to know the difference, and that is</p> <p>7 what the recent Wal-Mart suit was all about</p> <p>8 because Wal-Mart wanted to know what kind of</p> <p>9 cards their consumers were using, and Visa</p> <p>10 and MasterCard wouldn't tell them. Now, you</p> <p>11 can tell what kind of card the consumer is</p> <p>12 using, but at that time, you couldn't.</p> <p>13 Q. So from 1987 through 1995, Litle & Company</p> <p>14 accepted debit and credit cards?</p> <p>15 A. Yes.</p> <p>16 Q. Again, looking at Litle 4, If you go to the</p> <p>17 page that's marked LI00027 --</p> <p>18 A. Okay.</p> <p>19 Q. -- it appears that each of those four</p> <p>20 parties signed the agreement sometime in May</p> <p>21 or June of 1992; is that correct?</p> <p>22 A. That's right.</p> <p>23 Q. And how many other agreements like this did</p> <p>24 Litle & Company have?</p> <p>25 A. In 1992? I don't know. When we sold the</p>	<p style="text-align: right;">Page 37</p> <p>1 term for all kinds of credit cards or debit</p> <p>2 cards or any kind of card that we process,</p> <p>3 because there were T & E cards that were</p> <p>4 like American Express and Discover. There</p> <p>5 were debit cards, there were credit cards,</p> <p>6 there's JCB, which is a Japanese card. So</p> <p>7 the term for all kinds of cards, regardless</p> <p>8 of what they were, was what we call charge</p> <p>9 cards.</p> <p>10 Q. How did American Express and Discover differ</p> <p>11 from Visa and MasterCard?</p> <p>12 A. Visa and MasterCard, we actually purchased</p> <p>13 the transactions from the merchant and paid</p> <p>14 them a discount. We were also responsible</p> <p>15 for any of the liabilities of the merchants</p> <p>16 to the credit card networks as a result of</p> <p>17 that purchase. American Express and</p> <p>18 Discover are single companies. They are not</p> <p>19 a bunch of organizations trying to work</p> <p>20 together the way with Visa and MasterCard</p> <p>21 were with all the banks that participate in</p> <p>22 the networks, and as a result, one of the</p> <p>23 by-products of that is we did not purchase</p> <p>24 the cards. We just conveyed the cards back</p> <p>25 and forth or conveyed the transactions back</p>

<p style="text-align: right;">Page 38</p> <p>1 and forth to American Express or Discover or 2 Diners at that time, and so we didn't have 3 any liability. We weren't in the cash 4 stream. We didn't actually pay the 5 merchants for those transactions. 6 Q. Okay. 7 A. In fact, the merchants were paid directly by 8 American Express, Discover, JCB, Diners. 9 Q. So you mentioned that when Litle & Company 10 was sold in 1995, there were roughly a 11 thousand or so merchants who had signed a 12 similar agreement to this; is that correct? 13 A. Yeah, as it evolved over time. 14 Q. And at that time, were these agreements 15 identical or did you alter them for an 16 individual merchant? 17 A. We would have addendums on them if we did 18 services, different kinds of services. 19 There are optional services that we would do 20 for merchants. 21 Q. But the card processing portion of the 22 agreement was identical among all the 23 merchants? 24 A. Yes. The bulk of it was identical. Well, 25 it wasn't identical. It would evolve as we</p>	<p style="text-align: right;">Page 40</p> <p>1 sell a terminal to a dry cleaner, for 2 example, for an exorbitant price, and that 3 would be their payment and then they would 4 turn the payment over to a payment 5 processor. That kind of company evolved 6 over time and it was difficult for Visa and 7 MasterCard to figure out how to deal with 8 them. In fact, they kind of wished they'd 9 all go away, and so what they did is kind of 10 re-defined ISO's and an ISO now is any 11 company that signs up a merchant and goes 12 and signs merchants for payment processing 13 contracts like this. So at sometime, that 14 definition of an ISO was developed, and if 15 it was developed before I sold the company, 16 yes, we would have been a registered ISO, 17 and if it was developed after I sold the 18 company, no, we wouldn't have been a 19 registered ISO. On the other hand, we're 20 primarily a third-party processor, and 21 that's the way the networks look at it. 22 Most ISO's don't do all the payment 23 processing. Some ISO's don't take the 24 liability of the merchant. There's all 25 kinds of different relationships, but to</p>
<p style="text-align: right;">Page 39</p> <p>1 discovered that we should have put something 2 else in, like any agreement does, and one of 3 the ways it did evolve is, I notice on this 4 agreement it's got National Processing 5 Company and National Bank of Louisville. 6 You notice the same guy signed in both 7 places, and it was a little confusing 8 because the relationships with Visa and 9 MasterCard were changing at that time, or 10 their rules were changing. Sorry. 11 Q. Was Litle & Company an authorized ISO for 12 MasterCard and Visa prior to its sale to 13 First USA in 1995? 14 MR. EDELMAN: Objection. Leading. 15 A. That's a complicated answer. When we first 16 got involved in the payment processing 17 business, the term "ISO" wasn't a 18 recognized term. After a while, 19 organizations started selling payment 20 processing on behalf of third-party payment 21 processors. We were basically a third-party 22 payment processor, and the ISO 23 organizations, Independent Sale 24 Organizations, their primary responsibility 25 was selling. They sold -- they typically</p>	<p style="text-align: right;">Page 41</p> <p>1 answer the question, if the regulations said 2 that, because we signed merchants, we should 3 be an ISO, then we would have registered as 4 an ISO. As far as I was concerned, that 5 would be fairly routine. 6 Q. Did Litle & Company ever sign up a merchant 7 under a Member Agreement and turn the 8 transactions over to NPC? 9 A. No. NPC -- what we did is, originally, we 10 sent the transactions, after we did the 11 processing, we used NPC as a gateway into 12 the payment processing system. They didn't 13 perform as a payment processor. They only 14 performed as a gateway for us. After time 15 went on, we put our transactions directly 16 into the networks without any participation 17 of NPC, other than their sponsorship. 18 Q. Okay. Leaving the registration and 19 regulations about ISO's aside, at the time, 20 Litle & Company was an authorized ISO for 21 Visa and MasterCard; right? 22 A. If it was required, we were. If anybody -- 23 let me put it this way. If anybody in the 24 country was a registered ISO, then we would 25 have been a registered ISO, as well.</p>

<p style="text-align: right;">Page 42</p> <p>1 Q. Referring again to Litle 4 at LI00024, the</p> <p>2 last paragraph of that page begins "If via</p> <p>3 Point of Sale Data Capture Terminal." Could</p> <p>4 you describe what a Point of Sale Data</p> <p>5 Capture Terminal is?</p> <p>6 A. That is a device that is used for</p> <p>7 card-present transactions, where somebody</p> <p>8 swipes the card and the transaction is</p> <p>9 captured that way. Most of our transactions</p> <p>10 were a result of a card-not-present merchant</p> <p>11 keying the order into their system and</p> <p>12 taking the order over the telephone if the</p> <p>13 card wasn't present in the transaction. As</p> <p>14 I said earlier, we did not do card-present</p> <p>15 transactions, typically. On the other hand,</p> <p>16 if we had a customer -- virtually all of our</p> <p>17 merchants had warehouse sales to get rid of</p> <p>18 their inventory, or maybe they had an outlet</p> <p>19 store or something like that or -- for</p> <p>20 example, Orvis was one of our customers, and</p> <p>21 they had a whole chain of stores. Hammacher</p> <p>22 Schlemmer did, too. As an accomodation, we</p> <p>23 would handle the terminal work. We could do</p> <p>24 a good job of it. We couldn't do it -- I</p> <p>25 mean, we didn't have any special expertise</p>	<p style="text-align: right;">Page 44</p> <p>1 if a refund was asked by a customer and the</p> <p>2 customer had to use a different credit card</p> <p>3 than the original credit card they charged</p> <p>4 the merchandise to, typically, that would go</p> <p>5 through a clerk that was trusted by the</p> <p>6 company, because there was a great deal</p> <p>7 of -- there's a possibility of fraud in the</p> <p>8 case that I'm talking about, so they would</p> <p>9 have a special clerk enter those kinds of</p> <p>10 transactions through a terminal.</p> <p>11 Q. And you said that was the majority or most</p> <p>12 of the merchants that you signed up under</p> <p>13 this agreement?</p> <p>14 A. Most of the merchants we signed up had at</p> <p>15 least one terminal, yes. As far as I know,</p> <p>16 they all had at least one terminal, but</p> <p>17 usually, they had one or two.</p> <p>18 Q. Okay. At this point, I'd like you to walk</p> <p>19 us through Litle & Company's method of</p> <p>20 processing a card transaction, and you can</p> <p>21 talk us through, you can draw a diagram,</p> <p>22 whatever you prefer, that would help you</p> <p>23 explain to us how a card transaction is</p> <p>24 processed --</p> <p>25 MR. EDELMAN: Objection. Leading.</p>
<p style="text-align: right;">Page 43</p> <p>1 at it, the way we did card-not-present</p> <p>2 transactions, but this paragraph was to</p> <p>3 identify the fact that we would have</p> <p>4 transactions that we captured in the</p> <p>5 traditional way in a retail store where</p> <p>6 somebody swiped the card.</p> <p>7 Q. So is the swipe machine a magnetic card</p> <p>8 reader?</p> <p>9 A. A physical credit card has a magnetic stripe</p> <p>10 on the back of it. It was a machine that</p> <p>11 would read that magnetic stripe.</p> <p>12 Q. And that's the machine that is referred to</p> <p>13 on LI-24?</p> <p>14 A. Yeah. It's a typical machine in a retail</p> <p>15 environment. If you ever watched the clerk</p> <p>16 swipe the card, that's the machine.</p> <p>17 Q. Okay. Do you know if Museum Publications of</p> <p>18 America had a retail outlet?</p> <p>19 A. I don't know for sure. Actually, most of</p> <p>20 our customers had some way -- some need for</p> <p>21 terminals. The retail outlet was one way.</p> <p>22 Another reason they would have a terminal is</p> <p>23 because they would -- lots of our merchants</p> <p>24 at that time would provide refunds through a</p> <p>25 facility -- well, let's see. Particularly,</p>	<p style="text-align: right;">Page 45</p> <p>1 Q. -- from purchase to --</p> <p>2 MR. EDELMAN: Vague and ambiguous,</p> <p>3 calls for a narrative.</p> <p>4 Q. -- from purchase through payment.</p> <p>5 A. Okay. I would be most comfortable in</p> <p>6 drawing a diagram, actually. Does that --</p> <p>7 MR. SMITH: It is. So let's just</p> <p>8 be clear what you're asking him to do then.</p> <p>9 So you want him to outline Litle & Co's. --</p> <p>10 basically, the entire process from purchase</p> <p>11 through --</p> <p>12 MR. GRAY: Right.</p> <p>13 MR. SMITH: You want him to do it</p> <p>14 in a narrative form, but also using a</p> <p>15 diagram that will then be entered into the</p> <p>16 record.</p> <p>17 MR. GRAY: Right, that identifies</p> <p>18 the parties involved.</p> <p>19 THE WITNESS: That does identify</p> <p>20 the parties involved? Okay.</p> <p>21 MR. EDELMAN: Vague and ambiguous.</p> <p>22 MR. SMITH: Okay. So we're</p> <p>23 speaking in generalities.</p> <p>24 A. What I'm going to do is draw a diagram of--</p> <p>25 I think you're asking me, just generically,</p>

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1 how payment processing works.
 2 Q. How payment processing worked under Litle 4,
 3 under the Member Agreement.
 4 A. What do I do with my microphone?
 5 MR. SMITH: You'll put it on the
 6 table.
 7 A. I should say I often do this when I'm
 8 teaching classes or explaining this to
 9 somebody, and the diagram always comes out
 10 different, so I don't guaranty -- but in any
 11 case, it all starts with the consumer and
 12 what the consumer does is makes his calls,
 13 the merchant -- I'll call it a CNP merchant,
 14 card-not-present merchant -- and orders the
 15 goods or services. The card-not-present
 16 merchant then wants to find out whether or
 17 not that card is a good transaction.
 18 Q. Mr. Litle, could you do a card-present
 19 transaction, if that differs at all from a
 20 card-not-present transaction?
 21 A. Okay. Why don't I say where it's different
 22 because, from the diagram point of view,
 23 it's very similar. Most of the differences
 24 in a card-not-present transaction are in how
 25 one protects themselves from liability, how

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1 one resolves disputes between the cardholder
 2 and the merchant, those kinds of things, and
 3 those wouldn't show up in a diagram, but if
 4 I think of something that's different, I'll
 5 explain it when I'm doing it.
 6 Q. Thank you.
 7 A. So the card -- but in this case, the
 8 card-not-present merchant, one place where
 9 it is different is when the consumer orders
 10 and the card is not present, they typically
 11 call up on the phone. These days, they fill
 12 in their own order on the internet, or they
 13 send in an order form through the mail. So
 14 there is no card there. They can't swipe a
 15 terminal. In a card-present environment,
 16 the merchant -- the person would be there
 17 at the cash register, they'd have their
 18 stuff -- they'd have their card, and it
 19 would all happen together. Okay. So the
 20 card-not-present -- the merchant then, in
 21 all cases, would go and get an
 22 authorization, typically hooked up with the
 23 payment processor. Now, a payment
 24 processor, which would be us, in this case.
 25 So they have an authorization request, which

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1 I'll represent with a question mark, and
 2 then the payment processor returns an answer
 3 and it says either yes or no and all kinds
 4 of flavors of no, but it says yes or no,
 5 this is a card that's going to be good and
 6 the merchant is likely to be paid, and I'll
 7 explain that later.
 8 Q. Does the payment processor make that
 9 determination?
 10 A. No. Where the payment processor gets that
 11 information is going to be this side of the
 12 diagram. But the payment processor goes and
 13 gets an authorization through the networks,
 14 eventually back to the card-issuing bank,
 15 but I'll draw that in a second. But as soon
 16 as the merchant gets an authorization to go
 17 ahead and make the sale -- and you know what
 18 that is in a retail environment. You wait
 19 for a minute and then the code comes back,
 20 and that tells the merchant they can make
 21 the sale, and then what the merchant then
 22 does is it ships the order to the consumer.
 23 I won't get into back orders and partial
 24 orders and all that kind of stuff. That can
 25 make it pretty complicated. Okay. Then

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1 what the merchant does is, simultaneously
 2 with shipping the orders, the merchant then
 3 sends a settlement transaction and there's
 4 still a bunch of flavors of that, but
 5 typically, they send in a settlement
 6 transaction to the payment processor.
 7 Q. And what is the settlement transaction?
 8 A. The settlement transaction is the merchant's
 9 notification that it's fulfilled the
 10 consumer requirement and that they want the
 11 money for this sale. So the settlement
 12 transaction is the one we buy.
 13 Q. And that includes the dollar amount of the
 14 purchase?
 15 A. That's true.
 16 MR. EDELMAN: Objection. Leading.
 17 I just want a standing objection that I
 18 object -- my initial objections stated when
 19 the question came to lead to this
 20 presentation and I don't want to interrupt
 21 the flow of the presentation, but I do have
 22 a standing objection to the entire
 23 presentation. As long as we understand
 24 that, we can go ahead.
 25 A. So the payment processor interfaces to the

13 (Pages 46 to 49)

<p style="text-align: right;">Page 50</p> <p>1 networks, as I call them, and I'm talking 2 about Visa and MasterCard transactions now. 3 The payment processor, when it gets asked 4 for an authorization -- we don't know how to 5 determine whether a consumer has a good card 6 or not, so we send it to the Visa and 7 MasterCard networks. I'll just say "Visa," 8 but it means Visa and MasterCard, and Visa 9 switches the authorization request back to 10 the card-issuing bank. So again, this is 11 this path, the authorization request, we go 12 to Visa and MasterCard, they switch it to 13 the card-issuing bank, and the card-issuing 14 bank is the one that generates the yes or 15 no. That comes back to us and then that 16 goes to the merchant that's asking for the 17 authorization. This whole process of going 18 through here to the card-issuing bank and 19 back again is between one and two seconds, 20 typically. 21 Q. And the box labeled "PP" is Little & Company? 22 A. That's right, or a payment processor like 23 us. Everybody basically does it the same 24 way, although they may use different ways, 25 they may use different suppliers. For</p>	<p style="text-align: right;">Page 52</p> <p>1 have processed a dozen paper transactions. 2 So anyway, this is how the 3 authorization works. Then the settlement 4 comes to the payment processor. The 5 settlement at this point in time then went 6 to NPC, which entered the settlement 7 transactions into Visa. This was an 8 electronic transaction that just specified 9 how many dollars this merchant was trying to 10 collect. Okay. So when it went through 11 here back to the card-issuing bank, it was 12 the card issuing bank's job to pay off the 13 merchant. So the card-issuing bank -- I'll 14 use another color. Now, this is really 15 money that comes from the card-issuing bank 16 back through the Visa networks. Visa has a 17 big clearinghouse and interestingly enough, 18 in this case, the dollars go to the 19 acquirer, which is our sponsor bank, and 20 so -- NPC and first of Louisville were the 21 same thing -- but the dollars would go to 22 the First of Louisville, and at this time, 23 one of the reasons there was a three-party 24 agreement is because the First of Louisville 25 would pay off the merchant. They would</p>
<p style="text-align: right;">Page 51</p> <p>1 example, at this point if time, we really 2 went to an authorization supplier called NDC 3 and NDC went into the Visa and MasterCard 4 network. NDC is now called Global Payments, 5 and the answer came back through here. 6 Q. So are you saying that the authorization 7 request was -- it was always routed through 8 Little & Company? 9 A. Yes, because one of the services that we 10 offered and still do is the interface with 11 the merchant because the merchants typically 12 have order entry systems that they wrote 13 themselves or they bought from somebody and 14 it's been modified over time, and there are 15 all kinds of interfaces, there are all kinds 16 of networks, ways of doing authorizations 17 through the networks. We do most of it now, 18 for example, through the internet, but at 19 that time, it was done on dial-up modems or 20 through frame relay systems. That's -- we 21 communicated with the merchants. This is 22 virtually all electronic. I don't think we 23 ever -- we didn't process much paper. We 24 had the capability, but -- out of a couple 25 of billing transactions a year, we might</p>	<p style="text-align: right;">Page 53</p> <p>1 actually wire or, by ACH, transfer the money 2 to the merchant, and how did they know what 3 to transfer to the merchant? They 4 transferred whatever we told them to. We 5 issued instructions. This is kind of a 6 mess, but we issued instructions to NPC and 7 First of Louisville and said "Wire so much 8 money to the merchant," and that's what they 9 did. That's a typical transaction. That 10 would be true of the card-present or 11 card-not-present transaction, except for the 12 actual swipe of the cards. 13 Now, the dollars that actually got 14 transferred is, the card-issuing bank would 15 transfer -- let's say it was a hundred 16 dollars that was originally charged. The 17 card-issuing bank would keep part of that 18 hundred dollars called interchange. It's an 19 amount of money that the card-issuing banks 20 just get in the transaction. That's 21 probably -- these days, it's one and a half 22 to two percent. So let's say the 23 card-issuing bank, when they got a request 24 for a hundred dollars, this amount that they 25 actually sent, let's say it was \$98.50,</p>

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1 because they kept their, say, one and a
 2 half. There are about 200 different
 3 interchange rates, depending on different
 4 situations. So I'm just saying it's about
 5 one and a half percent. It's higher for
 6 card-not-present transactions. It's lower
 7 for run-of-the-mill straight retail
 8 transactions. Okay. This money would then
 9 go to -- they deducted their interchange and
 10 then when it came to Visa, Visa would then
 11 deduct what they called their assessments.
 12 So right here, this amount of money was more
 13 like, say, \$98.35. Right here. Our
 14 acquiring bank or First of Louisville would
 15 get the \$98.35. We would tell First of
 16 Louisville in bulk -- we didn't tell them
 17 transaction-by-transaction -- we would tell
 18 them to transfer \$98 to the card-not-present
 19 merchant, and then we would tell them to
 20 transfer 35 cents to us for our fee.
 21 Q. Will you label the \$98 step from First of
 22 Louisville to the merchant as Step Z with
 23 the red marker? I'm going to ask --
 24 A. Label it as Step Z?
 25 Q. Yes, sir. Thank you.

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1 A. Okay.
 2 Q. Okay. What type of equipment would Little &
 3 Company use in this process?
 4 MR. EDELMAN: Objection. Vague and
 5 ambiguous. Step Z doesn't have Little &
 6 Company.
 7 MR. GRAY: I didn't refer to Step
 8 Z.
 9 A. I'm sorry. What kind of equipment we use
 10 where?
 11 Q. For each of the arrows that go into and out
 12 of PP, the box labeled PP.
 13 A. We used various kinds of computers. We used
 14 communications equipment. We used, you
 15 know, terminals and stuff, so that our
 16 operators can control the process. I'm not
 17 quite clear what you mean.
 18 Q. No. That's what I was looking for; and what
 19 type of software would those computers use?
 20 A. It was all software we wrote ourselves, and
 21 it was -- at that time, we used C. C is a
 22 programming language. We used Stratus
 23 computers by brand. We used the Stratus
 24 operating system. We had other kinds of
 25 computers. We had a Pyramid -- no -- an

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1 Encore computer. We had all kinds of
 2 stuff. We had UPS systems, generators, to
 3 keep everything going, in case we lost
 4 power, all kinds of backup equipment. All
 5 together, I don't know how far it was, ten
 6 or 20 million dollars worth of equipment.
 7 Q. And you said in Step Z, the method of
 8 transferring those funds was via ACH or wire
 9 transfer?
 10 A. Yes. It depended on the merchant and how
 11 fast our deal was and they would get their
 12 money because ACH took an extra day,
 13 compared to wire, but it was less expensive
 14 and more automatable.
 15 Q. And both of those are electronic transfers?
 16 A. Yes.
 17 Q. You can have your seat back. Thank you very
 18 much. You mentioned a few of these examples
 19 earlier.
 20 MR. SMITH: Sorry.
 21 Q. You mentioned a few of these examples
 22 earlier, but for Step Z in the diagram
 23 you've drawn, was there ever a time when
 24 First of Louisville, which I'll call FNBL,
 25 when FNBL did not forward the entire, in

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1 your example, \$98 to the merchant in Step
 2 Z?
 3 A. Yes.
 4 MR. EDELMAN: Objection. Leading.
 5 MR. SCHUURMAN: How is that
 6 leading? "Were there any instances."
 7 MR. EDELMAN: We can have a
 8 discussion, if you'd like to.
 9 Q. Could you list those examples?
 10 A. Well, there was a period of time, as I said,
 11 Visa and MasterCard changed the rules
 12 around, and before that was changed, we got
 13 the money in our bank accounts, but there
 14 were instances of payment processors that
 15 basically ran off with merchants' money. So
 16 Visa and MasterCard changed that. So the
 17 third-party payment processors, which we
 18 are, or which we were, didn't actually ever
 19 see the cash. That was one instance.
 20 Another instance was where we wired money to
 21 a third party because that was the deal we
 22 had with the merchant or the merchant had
 23 with the third-party and we were instructed
 24 to do that, so we did.
 25 Q. What types of third parties were you

15 (Pages 54 to 57)

<p style="text-align: right;">Page 58</p> <p>1 instructed to wire funds to?</p> <p>2 A. Well, there were several. One of them was</p> <p>3 to us or to organization we controlled, if</p> <p>4 we had advanced postage money to the</p> <p>5 catalog, then we had pre-arranged schedule</p> <p>6 in which they'd pay that back after the</p> <p>7 catalog was mailed and they began to get</p> <p>8 orders, and we would collect -- we would</p> <p>9 keep some of the proceeds of that in</p> <p>10 addition to our fees, and that was a -- it</p> <p>11 was kind of a separate operation where we</p> <p>12 basically advanced money and then collected</p> <p>13 it as part of the merchant stream. That was</p> <p>14 one example.</p> <p>15 Another example was very similar to</p> <p>16 what we did when we started DMGT, and that</p> <p>17 was, we made a three-way deal with the</p> <p>18 merchant, where the merchant, for various</p> <p>19 reasons, would want us to work with the</p> <p>20 fulfillment company, and whenever the</p> <p>21 merchant had a customer that they had a</p> <p>22 fulfillment company fulfill for them, the</p> <p>23 fulfillment company, just like we did in</p> <p>24 1982, but this is an independent fulfillment</p> <p>25 company, would want to be paid right after</p>	<p style="text-align: right;">Page 60</p> <p>1 wouldn't send us any transactions, unless</p> <p>2 the goods were actually shipped. All of our</p> <p>3 interests were served and this lady that</p> <p>4 invented the mop made millions of dollars;</p> <p>5 whereas, otherwise, nobody would have done</p> <p>6 her work.</p> <p>7 Q. When was this when you processed the mop</p> <p>8 transactions?</p> <p>9 A. I don't know. It was probably in the early</p> <p>10 nineties sometime. It was certainly before</p> <p>11 I sold the company.</p> <p>12 Q. Were there other examples of when you paid a</p> <p>13 third party?</p> <p>14 A. Yeah. We did that in the info-mercial</p> <p>15 industry quite regularly. That was -- that</p> <p>16 was sort of a normal course of action.</p> <p>17 Q. Were there other examples, outside the</p> <p>18 fulfillment industry or info-mercial</p> <p>19 situation?</p> <p>20 A. Yeah. There was sort of a third kind of way</p> <p>21 we paid people, and that was, if one of our</p> <p>22 merchants had a line of credit with a</p> <p>23 financial institution or a financial funding</p> <p>24 source of some sort, very often, we would</p> <p>25 participate in a deal such that that funding</p>
<p style="text-align: right;">Page 59</p> <p>1 they shipped the goods. Typically, in this</p> <p>2 case, it was an info-mercial type of</p> <p>3 company, and the one I remember the best is</p> <p>4 the woman that invented the mop that you</p> <p>5 could ring out without getting your hands</p> <p>6 wet. Anyway, she was not a business</p> <p>7 person. The fulfillment company wanted her</p> <p>8 business, but didn't really trust that they</p> <p>9 were going to get paid, and we wanted to do</p> <p>10 her payment processing, but really didn't</p> <p>11 trust that she would ship her orders before</p> <p>12 she sent the transaction to us, and of</p> <p>13 course, if somebody hasn't shipped the</p> <p>14 orders and we get transactions from them, we</p> <p>15 give them the money for orders they haven't</p> <p>16 shipped and they never ship the orders, we</p> <p>17 are in deep trouble. So we want to do</p> <p>18 everything we can to make sure that the</p> <p>19 order is shipped. So there was a three-way</p> <p>20 deal. We would pay on behalf of the</p> <p>21 merchant the fulfillment company, generally</p> <p>22 on a daily basis, and the fulfillment</p> <p>23 company wouldn't have to guaranty the</p> <p>24 financial viability of the merchant, but</p> <p>25 they would have to guaranty that they</p>	<p style="text-align: right;">Page 61</p> <p>1 credit could call us up and say "Now,</p> <p>2 instead of sending the money to the</p> <p>3 merchant, you've got to send it to us."</p> <p>4 They looked at that as security on their</p> <p>5 loan, and sometimes, actually, we didn't</p> <p>6 know about those deals. The lending</p> <p>7 institution just made the deal with the</p> <p>8 merchant and didn't include us, but would</p> <p>9 call us up and say "Now, you should send us</p> <p>10 all the money," and we would say "Who are</p> <p>11 you," and then we'd get the merchant on the</p> <p>12 phone and we'd figure out that the merchant</p> <p>13 had made the deal with the funding source,</p> <p>14 and so we obviously don't want to send money</p> <p>15 to somebody that isn't authorized to get</p> <p>16 it. You know, there were those two kinds of</p> <p>17 situations where we would forward money to a</p> <p>18 funding source. In some of those</p> <p>19 situations, or in the kind of situation, if</p> <p>20 a company was going out of business and</p> <p>21 going out of business hard, the funding</p> <p>22 source might want to get all the funds, a</p> <p>23 hundred percent. Usually, what happened was</p> <p>24 the funding source wanted to keep the</p> <p>25 company alive enough so that it could sell</p>

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1 its inventory to the people that were
2 ordering from the catalog at full price,
3 because they could get more money back than
4 if they put the company out of business and
5 had to sell it all to some sort of jobber.
6 So the result was that it was usually a
7 percentage of the proceeds would go to the
8 funding source.

9 Q. And where would the remaining percentage
10 go?

11 A. That would go to the merchant.

12 Q. Did Litle & Company require reserve accounts
13 for its merchants?

14 A. Depended on the merchant. Depended on the
15 creditworthiness of the merchant, because
16 one of the important things that a payment
17 processor does is take the liability of the
18 merchant performing for the customers. If
19 it doesn't, it gets chargebacks and the
20 chargebacks come to Litle & Company and it's
21 up to us to collect it.

22 Now, if a merchant was out of
23 business or disappeared, we needed some
24 funds to draw on to be able to collect those
25 kinds of chargebacks. So if there was any

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1 likelihood that a merchant would go out of
2 business, we kept a reserve.

3 Q. Did the merchants ever rent or purchase
4 equipment, such as terminals, from a third
5 party?

6 A. In our case, usually, they didn't, but
7 that's not an unusual thing to happen,
8 because we didn't have enough terminals
9 around -- I mean, a big payment processor
10 like Global probably has five million
11 terminals outstanding. We might -- if we
12 had 500, I would have been surprised.
13 Well, maybe we did, because of Hammacher
14 Schlemmer -- but it was in the low thousands
15 that we would have had. So generally, we
16 just bought them and we had ownership of
17 them and we would provide them to the
18 merchants in one of three ways. We'd either
19 give them to the merchant, we'd sell them to
20 the merchant, or we would charge them a
21 monthly fee for that equipment.

22 Q. How would the merchant pay the monthly fee,
23 for example?

24 A. We deducted that from their payment stream
25 that we would have otherwise sent to the

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1 merchant.

2 Q. So where would that money go, instead of to
3 the merchant?

4 A. It would go to us.

5 Q. From First National Bank of Louisville?

6 A. Right. That would be part of the transfer
7 that we instructed First National Bank of
8 Louisville to do.

9 Q. And that equipment rental fee or purchase
10 fee would be in addition to the processing
11 fees Litle typically charges its merchants?

12 A. That's true, and there are other kinds of
13 charges. Obviously, chargebacks -- unfunded
14 chargebacks -- well, that's more
15 complicated. Then there are fines and there
16 are all kinds of various charges that
17 merchants pay, depending on what happens.

18 Q. What is an example of one of those fines or
19 fees?

20 A. It wasn't done as much then, but it was --
21 it's done more now -- if a merchant deposits
22 or tries to settle a transaction that wasn't
23 properly authorized and does it a lot, Visa
24 and MasterCard are likely to impose a fine.
25 That fine is on us, as a payment processor,

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1 and then again, it's up to us to collect it
2 from the merchant.

3 Q. Did Litle & Company, charge, for example, a
4 wire fee?

5 A. Yes. I think we charged -- I don't really
6 remember -- ten bucks a wire and \$2.50 for
7 an ACH.

8 Q. Could you explain what the wire is? If the
9 merchant requested that, how does this
10 process change?

11 A. It didn't change at all. The Z up there
12 from First of Louisville, if it was a wire,
13 it generally meant that the wire amount was
14 determined on a given day, and that same
15 day, the money was transferred from First
16 National Bank of Louisville to the
17 merchant's account. An ACH -- if it was
18 determined on the same day that an ACH of so
19 much money should be transferred, the actual
20 transfer didn't take place until the
21 following day.

22 Q. And how would the merchant pay the wire fee
23 or the ACH fee?

24 A. It would be deducted from the -- as a fee
25 from the amount of money that is represented

17 (Pages 62 to 65)

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1 by the Z step.
 2 Q. In addition to the standard Litle & Company
 3 processing fees?
 4 A. That's true.
 5 Q. And First National Bank of Louisville would
 6 then forward that fee to Litle & Company?
 7 A. Yes. In the -- where it said 35 cents, in
 8 that step, that would be part of our
 9 instructions to First National Louisville
 10 and how to transfer money.
 11 MR. GRAY: I think now would be a
 12 good time for a break, if you would like
 13 one.
 14 THE VIDEOGRAPHER: The time is
 15 10:52. This is the end of Cassette 1. We
 16 are off the record.
 17 (Recess.)
 18 THE VIDEOGRAPHER: The time is
 19 11:06. This is the beginning of Cassette
 20 Number 2 in the deposition of Thomas Litle.
 21 We are on the record.
 22 Q. (Cont'd. By Mr. Gray) Mr. Litle, you've
 23 spoken, generally, about six different
 24 examples of when FNBL paid a third party out
 25 of credit card receivables out to the

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1 merchant, and I'd like to go through each
 2 one of those in detail at this point, all
 3 right, beginning with the example you gave
 4 involving a line of credit a merchant
 5 received.
 6 A. All right.
 7 MR. GRAY: I'd like to mark this.
 8 (Letter dated February 17, 1994 is
 9 marked Exhibit Number 5 for
 10 Identification.)
 11 Q. I'm handing you what has been marked Litle
 12 5, which is a letter from Robert George, the
 13 President of Boston Publishing Company, what
 14 appears to be the President of Boston
 15 Publishing Company, to Michael Duffy,
 16 Vice-president of Litle & Company, dated
 17 February 17, 1994. Could you describe the
 18 agreement that this letter speaks about?
 19 MR. SMITH: Objection. You skipped
 20 a step there.
 21 Q. Have you seen this letter before?
 22 A. Yes.
 23 MR. EDELMAN: Objection. Vague and
 24 ambiguous. Leading.
 25 Q. Could you describe the agreement this letter

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1 embodies?
 2 A. This letter describes an agreement between
 3 Hanover Direct and Boston Publishing Company
 4 in which Hanover Direct supplied a line of
 5 credit of three million dollars to Boston
 6 Publishing, and Hanover has -- has a
 7 security interest in lots of Boston
 8 Publishing's assets, maybe all of them,
 9 including the right, and I'm quoting,
 10 "rights of the borrower," meaning Hanover,
 11 "to receive payments in respect of card
 12 sales from Litle & Company."
 13 Q. What does that mean?
 14 A. That means, as I interpret this, that if
 15 Hanover Direct called us up and said, in
 16 Step Z there, "Instead of sending the money
 17 to Boston Publishing, send some or all of it
 18 to Hanover Direct."
 19 Q. In the situation where FNBL would send some
 20 of the money to Hanover Direct, where would
 21 the remaining portion be sent?
 22 A. Go to the merchant.
 23 Q. So FNBL would forward a percentage of the
 24 credit card receipts to Hanover Direct --
 25 A. That's right.

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1 Q. -- electronically --
 2 A. That's right.
 3 Q. -- and would electronically forward the
 4 remainder of the credit card payments to the
 5 merchant?
 6 A. That's right.
 7 Q. Are you aware of any relationship between
 8 Boston Publishing Company and Museum
 9 Publications of America?
 10 A. One of them was the name of the catalog and
 11 one of them was the name of the company that
 12 owned the catalog, as far as I can tell.
 13 Q. Did Litle 5 -- did this letter amend an
 14 agreement similar to the Member Agreement
 15 that was in Litle 4 between Museum
 16 Publications of America and Litle &
 17 Company?
 18 A. I suppose -- yes. I suppose it did.
 19 Q. How would FNBL electronically forward a
 20 portion of those credit card receivables to
 21 Hanover Direct?
 22 A. Either wire or ACH. I wouldn't know which
 23 without looking at the agreement more
 24 carefully.
 25 Q. Is there any relationship between Litle &

18 (Pages 66 to 69)

<p style="text-align: right;">Page 70</p> <p>1 Company and Boston Publishing?</p> <p>2 A. Yes. They were a customer, they were a</p> <p>3 merchant of ours.</p> <p>4 Q. Beyond that, there is no other relationship?</p> <p>5 A. No.</p> <p>6 Q. Is Boston Publishing related to FNBL?</p> <p>7 A. No.</p> <p>8 Q. Is Boston Publishing related to NPC?</p> <p>9 A. No.</p> <p>10 MR. SMITH: I just want to note my</p> <p>11 objection. We're talking about back in the</p> <p>12 date of this agreement; right?</p> <p>13 MR. GRAY: Right.</p> <p>14 Q. On Litle 5, in the "Re" line," it says</p> <p>15 "Boston Publishing Company, Inc., Litle</p> <p>16 Agreement dated dated 6/8/90." Would that</p> <p>17 Litle agreement be a Member Agreement like</p> <p>18 the Member Agreement in Litle 4?</p> <p>19 A. Yes, it would.</p> <p>20 Q. About how many arrangements such as that</p> <p>21 described in Litle 5 did Litle & Company</p> <p>22 enter into?</p> <p>23 MR. EDELMAN: Objection. Vague and</p> <p>24 ambiguous.</p> <p>25 A. Well, in this case, I'm not sure we really</p>	<p style="text-align: right;">Page 72</p> <p>1 interest in the funds.</p> <p>2 Q. At that point, how would you go about</p> <p>3 diverting the funds?</p> <p>4 A. It would be our instructions to -- first to</p> <p>5 Louisville in how they transferred the</p> <p>6 funds. It would be an ACH or a wire to all</p> <p>7 of the parties who were involved.</p> <p>8 Q. What percentage was typically diverted?</p> <p>9 A. Oh, boy, that varied all over the place.</p> <p>10 Sometimes it was a hundred percent. Most of</p> <p>11 the time, it was a percentage that ranged</p> <p>12 from, I suppose, ten percent to 50 percent.</p> <p>13 Q. Could I ask you to go back to the board and</p> <p>14 just draw a picture for us, a picture of how</p> <p>15 Step Z was changed in this situation, such</p> <p>16 as the Hanover Direct that's in Litle</p> <p>17 Exhibit 5?</p> <p>18 MR. EDELMAN: Objection. Vague and</p> <p>19 ambiguous. Just again, my objection to the</p> <p>20 demonstration.</p> <p>21 A. Okay. In that case, there was a third party</p> <p>22 and the third party could take the form of</p> <p>23 the varieties of third parties we've talked</p> <p>24 about, but in the case you're asking about,</p> <p>25 we would have some of the funds -- some or</p>
<p style="text-align: right;">Page 71</p> <p>1 entered into it. We were just told that</p> <p>2 there was this agreement between Boston</p> <p>3 Publishing Company and Hanover, and they</p> <p>4 were alerting us to it and they didn't have</p> <p>5 to send us this letter. If they had that</p> <p>6 agreement and we didn't see this letter and</p> <p>7 Hanover Direct said "Send some or all of the</p> <p>8 money to us," you know, we would have done</p> <p>9 it on making sure that Hanover Direct had</p> <p>10 that ability because of an agreement between</p> <p>11 Hanover and Boston Publishing.</p> <p>12 So I don't know how many of these</p> <p>13 agreements actually existed. We probably</p> <p>14 were aware of a dozen of them, and I know</p> <p>15 there were others. I know there were</p> <p>16 others, because every once in a while, we'd</p> <p>17 get called up and somebody would say "Divert</p> <p>18 these funds for this reason."</p> <p>19 Q. And what would they mean by "Divert these</p> <p>20 funds"?</p> <p>21 A. That would mean they had a security interest</p> <p>22 in the funds and we should pay them to</p> <p>23 whoever had the security interest in the</p> <p>24 funds. Obviously, we would want to make</p> <p>25 sure they really did have a security</p>	<p style="text-align: right;">Page 73</p> <p>1 all of the funds sent to the third party</p> <p>2 instead of Z, or in addition to Z, and so</p> <p>3 there's just this extra step. So the total</p> <p>4 of what I'll call X and Z was a hundred</p> <p>5 percent of the funds we would normally send</p> <p>6 out. We just send it out in two different</p> <p>7 pieces, and the fees we would get was the</p> <p>8 extra wire or ACH, so we really didn't --</p> <p>9 it wasn't particularly profitable for us.</p> <p>10 Q. And in order for Litle & Company to provide</p> <p>11 those instructions to FNBL, you would verify</p> <p>12 that the merchant has an outstanding</p> <p>13 obligation to that third party?</p> <p>14 MR. EDELMAN: Objection. Vague and</p> <p>15 ambiguous. Leading.</p> <p>16 Q. Yeah. If we didn't identify the fact that</p> <p>17 that was a legitimate obligation to do that,</p> <p>18 we would have been liable for sending money</p> <p>19 to a third party that we shouldn't have</p> <p>20 sent. So obviously, we didn't want to be</p> <p>21 liable for that.</p> <p>22 Q. So in the process where FNBL was forwarding</p> <p>23 a portion of the payments to the third</p> <p>24 party, in this case, Hanover Direct, from</p> <p>25 beginning to end, could you walk us through</p>

<p style="text-align: right;">Page 74</p> <p>1 from, assuming it's a card-present merchant, 2 the presentation of the card through 3 payment? Just talk through. 4 MR. EDELMAN: Same objections. 5 Vague and ambiguous. Calls for a 6 narrative. Leading. 7 MR. SMITH: Could you clarify what 8 you're looking for? You want him to do the 9 whole process again? 10 Q. Yes. Could you just talk through the steps 11 that are drawn on the board? 12 A. Okay. Everything would be identically the 13 same. Hanover Direct, for sure, they had 14 outlet stores and so, assuming that it was a 15 sale from an outlet store, the consumer 16 would swipe the transaction through the 17 terminal. All that -- everything would be 18 identically the same as is shown on that 19 diagram, and some of the money that would be 20 diverted to the third party in the X step 21 would have come from that sale at the outlet 22 store, and some of it in Z would have come 23 from the outlet store. All that money, one 24 way or another, got funneled through one of 25 those two branches, assuming some of the</p>	<p style="text-align: right;">Page 76</p> <p>1 Q. And you're referring to Museum Publications 2 of America? 3 A. Museum Publications was the merchant, yes. 4 Hanover, in this case, would be extending 5 the line of credit. 6 Q. Okay. When the customer then went to the 7 store and swiped the card through a credit 8 card terminal, then at that point, the 9 information related to the payment, such as 10 the payment amount -- the payment amount and 11 the card number, would be sent as an 12 authorization request to Litle & Company; 13 correct? 14 A. Uh-huh. 15 Q. And that was electronically sent to Litle & 16 Company? 17 MR. EDELMAN: Objection. Leading. 18 Vague and ambiguous. 19 A. Yes. 20 Q. Then the authorization process would proceed 21 as you described earlier, electronically 22 through Litle & Company's computers and 23 networks? 24 A. Yeah, the authorization. We would get it, 25 we would route it through the networks.</p>
<p style="text-align: right;">Page 75</p> <p>1 money was going to a third party. 2 Q. Okay. So in this situation, the merchant 3 would have an obligation to pay some portion 4 of the receivables to Hanover Direct; 5 correct? 6 MR. EDELMAN: Objection. Vague and 7 ambiguous. Leading. 8 A. According to this agreement, the merchant 9 and Hanover Direct made, yes. 10 Q. And a customer would go to a Hanover Direct 11 retail store or outlet? 12 A. Actually, that's confusing. Hanover Direct 13 happened to be a catalog. It happened to be 14 a customer of ours. So I'm getting that a 15 little confused. If you look at them 16 strictly as providing a line of credit -- I 17 think that's the context you're looking at 18 now -- and this in that case, the consumer 19 would have bought something from Museum 20 Collections Outlet Store, and so the Museum 21 Collections money would go through that 22 process and Hanover Direct would be the 23 third party. It happened by coincidence to 24 be a catalog, but that was not significant 25 in the scheme of things.</p>	<p style="text-align: right;">Page 77</p> <p>1 We'd get the answer back. We'd send the 2 answer back to the, in that case, the 3 terminal, and that would, as I said, took 4 between one and two seconds. Then the 5 terminal would store up all those 6 transactions during the day. This is 7 typically how it was done. I don't remember 8 if Museum Collections did it exactly this 9 way, but it's typically how it's done. 10 They'd store up all those transactions, and 11 at the end of the day, the terminal itself 12 would send some settlement -- the settlement 13 money through basically the same route. 14 Actually, the settlement money, there would 15 be a little box between the merchant and us 16 because we didn't receive those settlements 17 directly. We had somebody else manage our 18 terminals for us and then they took care of 19 all the individual terminals that settled 20 and then they sent the bulk settlements to 21 us. 22 Q. As money was transferred from the 23 card-issuing bank -- or was money 24 transferred from the card-issuing bank to 25 the Visa/MasterCard network at that point?</p>

<p style="text-align: right;">Page 78</p> <p>1 A. After the settlement went through the 2 system, as I described before, the 3 settlement would go to us as the payment 4 processor, to NPC, who was the Gateway and 5 actually, operating as a gateway, not a 6 payment processor, into Visa. That 7 transaction would go in there. It would be 8 re-routed to one of the 12,000 banks that 9 issues credit cards, and then that bank 10 would actually pay a clearinghouse operated 11 by Visa and that clearinghouse -- Visa then 12 instructs that clearinghouse to send an 13 amount of money in total that NPC or First 14 of Louisville would get for all of their 15 merchant -- all the merchants that First of 16 Louisville did, for us because we were using 17 them as a gateway. So that money could go 18 to First of Louisville in bulk, for all 19 kinds of people, for Wal-Mart, for the 20 airlines. We were just in there, but it 21 would have been one wire. Then First of 22 Louisville would have then wired, according 23 to our instructions. They would they would 24 know how much money was due to our merchants 25 total, and we would tell them how to split</p>	<p style="text-align: right;">Page 80</p> <p>1 arrangements to pay third parties, the 2 fulfillment people, the creditors, the 3 postage. We looked at ourselves as a third 4 party for the postage financing because it 5 was a separate account, so we could figure 6 it out. So whatever third party it was 7 would have had some sort of arrangement or 8 we would have been made aware of an 9 arrangement between the merchant and the 10 creditor before we actually did that or 11 before we actually sent any money to the 12 creditor. 13 Q. Was the sort of arrangement you're 14 describing with Hanover Direct and the 15 merchant, was this a confidential 16 arrangement? 17 A. No, I don't think so. No, it was not. 18 Q. Would you solicit creditors to ask you to 19 divert funds? 20 A. Well, typically we didn't solicit the 21 creditors. We certainly didn't keep it a 22 secret that we would do that. We believe 23 that was a service that we offered to our 24 merchants and usually, the merchants would 25 come to us because they needed some sort of</p>
<p style="text-align: right;">Page 79</p> <p>1 it up; and in the case you're showing, some 2 of it would be actually sent to the merchant 3 and some of it would be sent to the third 4 party. 5 Q. And that would be electronically sent to the 6 merchant? 7 A. Oh, yeah. All of it was electronic. 8 Q. Then once Hanover Direct received that 9 money, they would apply that to whatever 10 obligation the merchant had? 11 A. Yeah, presumeably. I mean, I don't know 12 what they did with it, but as long as we met 13 our obligation, we didn't pay much attention 14 what happened next. 15 Q. And this letter, which is Little 5, is dated 16 February 17, 1994; correct? 17 A. Right. 18 Q. Are you aware of any agreements similar to 19 this or any instructions that you provided 20 to FNBL prior to 1994? 21 A. For Museum Collections? 22 Q. Or any merchant. 23 A. Yeah. We actually did postage financing for 24 these guys prior to this arrangement they 25 had, and there were -- yeah, we had</p>	<p style="text-align: right;">Page 81</p> <p>1 financing and they heard that, you know, we 2 could help them out in this, particularly, 3 you know, in the postage financing. We got 4 a lot of requests for that. 5 Q. So how would the merchant learn that you 6 were able to divert funds? 7 A. Well, the people that we did it for were 8 exceedingly pleased. One guy even got an 9 article in Forbes Magazine, I think, about 10 how he thought this was -- among other 11 things, talked about how this was an 12 innovative way he did his financing. A lot 13 of the consultants in the industry -- the 14 catalog industry is fairly close-knit and 15 there are a lot of consultants that run 16 around. They're sort of like honey bees 17 pollinating all the plants, and they tell 18 everybody all this stuff, and so a company 19 called Hearthsong, for example -- 20 Hearthsong, H-e-a-r-t-h-s-o-n-g -- and it 21 was a kids' catalog and they were trying to 22 sell their catalog and they didn't have 23 enough money to publish the last catalog, 24 and so we did postage financing. They were 25 able to publish the last catalog and they</p>

<p style="text-align: right;">Page 82</p> <p>1 successfully sold the company, and that</p> <p>2 was -- that kind of stuff was pretty</p> <p>3 well-known.</p> <p>4 Q. Okay. I'd like to talk to the postage</p> <p>5 advance arrangement in detail, but as far as</p> <p>6 the financing arrangement, the payments to</p> <p>7 creditors, like you just described on the</p> <p>8 board, how would the merchants learn about</p> <p>9 that situation?</p> <p>10 MR. EDELMAN: Objection. Calls for</p> <p>11 speculation, lack of foundation.</p> <p>12 A. They'd ask us. I mean, they heard about us</p> <p>13 from the consultant -- typically, the</p> <p>14 consultants. I can think of one who</p> <p>15 probably got four or five people to come to</p> <p>16 us because he was working with the company</p> <p>17 and providing value in his consulting and he</p> <p>18 found this information to help him provide</p> <p>19 values to his clients.</p> <p>20 Q. Do you remember his name?</p> <p>21 A. Yes, I do.</p> <p>22 Q. What is that?</p> <p>23 A. Jim Alexander.</p> <p>24 (Three-page photocopy of article</p> <p>25 entitled "People thought I was</p>	<p style="text-align: right;">Page 84</p> <p>1 this the article you referred to just a</p> <p>2 minute ago?</p> <p>3 A. I think so. Let me take a look at it. Yes,</p> <p>4 it is.</p> <p>5 Q. If you look at Page 3 of Litle 6 marked</p> <p>6 LI00003 --</p> <p>7 A. Yeah.</p> <p>8 Q. -- the first full paragraph on the page says</p> <p>9 "Finding capital remained a problem, but</p> <p>10 Bourne was innovative. Postage was his</p> <p>11 largest expense and in 1989, when he needed</p> <p>12 money, he turned to his credit card</p> <p>13 processor, a New Hampshire-based company</p> <p>14 called Litle & Co. Litle agreed to finance</p> <p>15 his postage by discounting his credit card</p> <p>16 receivables. It was such a good idea, other</p> <p>17 catalogers have followed suit."</p> <p>18 Can you describe, generally, the</p> <p>19 process of postage financing?</p> <p>20 A. Yeah. By discounting his credit card</p> <p>21 receivables wasn't quite it. It was -- his</p> <p>22 credit card receive abilities, we paid some</p> <p>23 of them to a third party. It wasn't exactly</p> <p>24 discounted, but other than that, this is</p> <p>25 exactly what I've described, except that</p>
<p style="text-align: right;">Page 83</p> <p>1 nuts" is marked Exhibit Number 6</p> <p>2 for Identification.)</p> <p>3 A. I don't remember if Jim was the --</p> <p>4 MR. SMITH: There's no question</p> <p>5 before you --</p> <p>6 A. -- consultant with Boston Publishing.</p> <p>7 Q. Do you remember any of the merchants he was</p> <p>8 a consultant for?</p> <p>9 A. Not that actually used the service. I just</p> <p>10 remember he was aware of what we were doing.</p> <p>11 Q. So Litle & Company's ability to perform this</p> <p>12 service was commonly known among</p> <p>13 consultants?</p> <p>14 MR. EDELMAN: Objection. Vague and</p> <p>15 ambiguous.</p> <p>16 A. I believe it was. You know, I certainly</p> <p>17 talked about it a lot. It was a value-added</p> <p>18 service that we offered that nobody else --</p> <p>19 no other payment processor seemed to offer</p> <p>20 on a regular basis and it made us look</p> <p>21 better to prospects.</p> <p>22 Q. I'm handing you what has been marked Litle</p> <p>23 6, which is an article from Forbes June 8,</p> <p>24 1992 issue, Volume 149, Note 12, Page 120,</p> <p>25 entitled "People thought I was nuts." Is</p>	<p style="text-align: right;">Page 85</p> <p>1 paying the money to a third party was paying</p> <p>2 it to us because we advanced them the</p> <p>3 postage. What we did -- and in order to</p> <p>4 advance him the postage, the process we</p> <p>5 would go through is, we would determine</p> <p>6 approximately what his Visa and MasterCard</p> <p>7 receivables or proceeds were going to be</p> <p>8 during the period immediately after he</p> <p>9 mailed the catalog, and then we would</p> <p>10 actually pay his postage bill. We wouldn't</p> <p>11 pay him. We'd actually pay the post</p> <p>12 office. We made sure the check went from us</p> <p>13 into the post office's hands. So he'd never</p> <p>14 see the check. He knew how much it was.</p> <p>15 Then we would -- we changed it around for a</p> <p>16 while, as we were getting used to it, but</p> <p>17 effectively, we would add a fee to the</p> <p>18 amount of the postage, and then we'd</p> <p>19 collect -- we'd collect a portion or we'd</p> <p>20 keep a portion of the proceeds that we would</p> <p>21 otherwise send him until we recovered our</p> <p>22 initial postage amount, plus our fee.</p> <p>23 Q. You said you would keep a portion of the</p> <p>24 credit card receivables?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 86</p> <p>1 Q. Would you instruct FNBL to forward that 2 portion to Litle & Company? 3 A. Yes. Then that was typically forwarded, it 4 is my recollection, to a separate account, 5 so that was a separate. 6 Q. A separate account from the processing fees? 7 A. Right. 8 Q. Would the payment itself be separate from 9 the processing fee payment? 10 A. I'm sorry. 11 Q. Because you said it was forwarded to two 12 separate accounts. 13 A. Right. 14 Q. That implies that FNBL made two separate 15 payments to Litle & Company? 16 A. That's true. 17 Q. One of those payments being payments for 18 processing fees? 19 A. All the routine stuff that they always did. 20 Q. And then the other payment to the separate 21 account being the payment to Litle in 22 satisfaction of the merchants' postage 23 advance obligation to Litle? 24 A. That's my recollection. Yeah, because we 25 wanted to keep it straight.</p>	<p style="text-align: right;">Page 88</p> <p>1 says "Principle Amount of Advance is 2 \$204,224.48"? 3 A. Right. 4 Q. And then directly underneath that, it says 5 "Management Fee: \$9,190.52." 6 A. Right. 7 Q. Could you describe what the management fee 8 is? 9 A. That was our fee. We advanced \$204,224.48 10 worth of postage and we collected that 11 amount, plus \$9,190.52, which I think was 12 about five percent. 13 Q. So -- and directly under that, it says 14 "Advance is payable to United States 15 Postmaster, Saratoga Springs, New York"? 16 A. That's right. 17 Q. So Litle & Company would advance the 18 principal amount of advance to the 19 Postmaster -- 20 A. That's correct. 21 Q. -- and in return, Museum Publications of 22 America would repay Litle & Company the sum 23 of principal amount of advance and 24 management fee? 25 MR. EDELMAN: Objection. Leading.</p>
<p style="text-align: right;">Page 87</p> <p>1 (Three-page document entitled 2 "Schedule E-1, Demand Promissory 3 Note for Postage Advances" is 4 marked Exhibit Number 7 for 5 Identification.) 6 Q. I'm handing you what has been marked Litle 7 7, which is Schedule E-1, Demand Promissory 8 Note for Postage Advances. The parties who 9 signed were Robert George from Litle & 10 Company -- 11 A. No. Robert George was from -- 12 Q. -- from Museum Publications of America. At 13 the top of Litle 7, it says "Schedule E-1." 14 Is this a schedule E-1 to the Member 15 Agreement? 16 A. Yeah. It's basically an addendum to the 17 Member Agreement. 18 Q. Okay. So it's an addendum agreement to the 19 Member Agreement in Litle 4? 20 A. Right. I think so. Litle 4 or a subsequent 21 agreement. I don't know. 22 Q. But a similar agreement with Museum 23 Publications -- 24 A. Right. 25 Q. -- of America. At the top of this page, it</p>	<p style="text-align: right;">Page 89</p> <p>1 A. Yes, that's correct. 2 Q. The first paragraph of Litle 7, it says "In 3 consideration of Litle & Company making 4 advances for the account of member to the 5 United States Postal Service, member agrees 6 to pay on demand the principle amount of 7 advance, plus management fee, to Litle & 8 Company or order," which is what you just 9 testified to; correct? 10 A. I think so, yeah. Yes. 11 Q. "Member further agrees that all charge card 12 transactions from all divisions and 13 subsidiaries will be processed by Litle & 14 Company while any amount owed under this 15 note is still outstanding." Could you 16 explain why member agrees -- 17 A. If we forward or if we advance them that 18 money and then he didn't process through us, 19 we have no way of collecting it. So 20 obviously, we wanted to preserve our way of 21 collecting the money. 22 Q. So if you advanced money to a merchant -- a 23 postage advance to a merchant, you would 24 process all of their card transactions? 25 A. That's correct.</p>

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1 Q. The next sentence says "Notwithstanding that
2 such amounts are otherwise payable on
3 demand, member agrees that" -- and I'm
4 skipping down to small ii,"the daily
5 repayments shall be deducted from daily net
6 proceeds." What does that mean?
7 A. It means that we collected our advance daily
8 against the proceeds that we otherwise would
9 have paid them. The net proceeds would be
10 Z, under normal circumstances in that
11 diagram, and what they paid us was X. So
12 that said, we deducted from Z.
13 Q. Does "net proceeds" have the same meaning in
14 Litle 7, Schedule E-1, as defined in the
15 Member Agreement, Litle 4?
16 A. Yes, it would.
17 Q. Litle 7 is dated September 27, 1993;
18 correct?
19 A. Is dated what?
20 Q. September 27, 1993.
21 A. Yes.
22 Q. The bottom by the signatures.
23 A. No. That's when the advance will be made.
24 Q. The advance will be made on September 17;
25 right? It says that on the top of the page,

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1 but it was signed on September 27, 1993;
2 correct?
3 A. Yes, it was.
4 Q. Are you aware of any postage advances Litle
5 & Company made prior to that time?
6 A. I think we had a regular program with these
7 guys. This wasn't the only one. I don't
8 remember whether this was the first one or
9 not the first one.
10 Q. About how many postage advances did Litle &
11 Company make?
12 A. Somewhere between three and six, probably.
13 Q. Three and six postage advances or
14 between three and six customers?
15 A. To these guys, we did postage advances
16 something like three to six times. I'm
17 guessing. I really don't remember, but they
18 published catalogs and they published them
19 multiple times of the year, so --
20 Q. So three to six to Museum Publications of
21 America?
22 A. Yeah.
23 Q. How many other merchants did Litle & Company
24 advance postage for?
25 A. I don't really remember. It must have been

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1 at least a dozen.
2 Q. How did you deduct the payments to Litle &
3 Company -- how did you instruct FNBL to
4 deduct the payments from Litle & Company?
5 MR. SMITH: Objection. Do you
6 understand the question?
7 THE WITNESS: I think so.
8 A. We didn't really instruct them to deduct
9 it. It was just an instruction of where
10 they wired the money to.
11 Q. And you would instruct them to wire it to
12 Litle & Company's bank account?
13 A. That's right.
14 Q. And that bank account is separate from the
15 bank account that you instructed FNBL to
16 wire the processing fees; correct?
17 A. It was, but I don't know if it always was.
18 Q. At some point, it was, though, prior to its
19 sale in 1995?
20 A. Yes.
21 Q. So again, going through the entire process
22 of a customer swiping a card at Museum
23 Publications of America, as the diagram is
24 drawn on the board, can you talk us through
25 the steps that you've outlined on the board?

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1 MR. EDELMAN: Objection. Vague and
2 ambiguous. Leading.
3 Q. Could you explain the steps, as you've drawn
4 them on the board and as they apply to this
5 agreement, for a card transaction at Museum
6 Publications of America?
7 A. Well, the steps, excluding the part about
8 the third party, were the same for Museum
9 Collections as for every one of our other
10 steps. That was a generic explanation,
11 excluding the third party.
12 Q. So the authorization and settlement steps,
13 up to the point of Step Z, are identical in
14 the Hanover finance situation, which you've
15 just described --
16 A. Uh-huh.
17 Q. -- and the postage advance situation?
18 A. Uh-huh, and the only difference is, in this
19 example of the postage advance, is the X
20 step was more than zero. It was whatever
21 the schedule called for.
22 Q. If you look at Page 3 of Litle 7, which is
23 marked LI00035, at the top, it says
24 "Repayment Schedule."
25 A. Yeah.

24 (Pages 90 to 93)

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1 Q. Is this the schedule you were just referring
2 to?
3 A. Yes.
4 Q. Or similar schedule?
5 A. Right.
6 Q. Could you describe what this schedule
7 provides?
8 A. Yeah. Before we did the postage financing,
9 as I think I said earlier, we figured out
10 about what the Visa/MasterCard volume of net
11 proceeds would be to the merchant, or in
12 this case, Museum Publications, and that was
13 obviously based on their experience with
14 mailing the catalog, what they expected
15 their sales would be, et cetera, and so this
16 schedule is a result of that expectation of
17 Visa/MasterCard net proceeds that they would
18 get and it described the weekly and daily
19 payments that would come to us in
20 satisfaction of our postage financing, in
21 satisfaction of our advance.
22 Q. Would you instruct FNBL to pay Museum
23 Publications of America weekly, as it
24 appears on this chart?
25 A. Well, this has both weekly and daily, and

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1 this varied. I don't remember exactly how
2 this was implemented, but it was normally
3 implemented as a percentage of the net
4 proceeds, which this prediction -- which
5 would approximate this prediction. It
6 wouldn't be -- necessarily be exactly this.
7 There were some occasions when we figured
8 out what the schedule was and we took
9 exactly this out. When I say we took it
10 out, we instructed First of Louisville to --
11 or that was part of our instructions to
12 First of Louisville. First of Louisville,
13 as I think is clear, had no idea what was
14 going on. If they didn't trust us, this
15 wouldn't have worked, because they didn't
16 have any idea whether the funds were going
17 to the right place. So we always looked at
18 it as though we really controlled the whole
19 process.
20 Q. So you would instruct FNBL to forward a
21 percentage of the credit card receipts due
22 the merchant -- the net proceeds due the
23 merchant?
24 A. I think, in most cases, that was true.
25 Sometimes we would instruct them to pay a

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1 fixed amount based on the original
2 projection.
3 Q. Would FNBL pay Little & Company daily?
4 A. Yes. All this process worked every day.
5 Did they pay on any other basis,
6 periodically or otherwise?
7 A. No. As far as they were concerned, they
8 sent out wires every day. Now, some of the
9 wires paying off third parties might not go
10 every day, but our instructions to them went
11 every day, and they followed our
12 instructions every day, bank day.
13 Q. What are examples of other instructions you
14 would give to pay third parties?
15 A. The fulfillment companies that we were
16 talking about. Depending on how many
17 shipments -- well, what we would do is, that
18 would typically be an approximation of the
19 fulfillment costs, and for every sale
20 transaction that we got, we would do a
21 calculation that was something like four
22 dollars plus four percent of sales or
23 something like that. We'd figure that out
24 and that would be part of our instructions
25 to First of Louisville, and we would pay the

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1 fulfillment guys every single day. So the
2 shipments they made on Monday, they would be
3 paid for on Tuesday or Wednesday. Sometimes
4 the money was delayed.
5 Q. Would you ever instruct FNBL to pay, you
6 know, every other day or multiple times per
7 day?
8 A. Well, no. FNBL only really sent -- FNBL,
9 they would always pay, according to our
10 instructions every day. Sometimes our
11 instructions didn't include a merchant --
12 maybe the merchant didn't send us a
13 settlement file that day or maybe the
14 merchant sent us more refunds than sales.
15 So we would instruct -- that would be ACH
16 debit to the account where we'd actually
17 take money out of the merchant's account,
18 but we did give instructions every day.
19 Whether those instructions involved an
20 individual merchant or any of these programs
21 every single day or not, just depended on
22 the circumstances.
23 Q. So if a merchant is included in those
24 instructions to FNBL, FNBL would make daily
25 payments to those merchants?

25 (Pages 94 to 97)

<p style="text-align: right;">Page 98</p> <p>1 A. Yeah.</p> <p>2 Q. Did you ever instruct FNBL to pay on a</p> <p>3 per-transaction basis?</p> <p>4 A. They had no facility to do that. Oh, I</p> <p>5 suppose we did. If somebody sent us one</p> <p>6 transaction, the wire for that day would be</p> <p>7 for one transaction, but the instructions</p> <p>8 were always for the, you know, total amounts</p> <p>9 for a given event.</p> <p>10 Q. When Litle & Company received these payments</p> <p>11 from FNBL, similar to the schedule that's</p> <p>12 reflected on Page 3 of Litle 7, did Litle &</p> <p>13 Company apply those payments to the postage</p> <p>14 advance obligation of the merchant?</p> <p>15 A. Yes, in the sense that we determined what</p> <p>16 the total amount, the postage advance, plus</p> <p>17 our fee, and we -- as the program developed,</p> <p>18 we made it clear that our fee was the first</p> <p>19 thing paid, and then they -- the transfers</p> <p>20 kept coming until the total advance, plus</p> <p>21 fee, was paid off, and then the payments,</p> <p>22 the X payments to the third party, in this</p> <p>23 case, us, stopped.</p> <p>24 Q. So as those payments came in, Litle &</p> <p>25 Company reduced the outstanding obligation</p>	<p style="text-align: right;">Page 100</p> <p>1 done it for less than five percent.</p> <p>2 (Five-page document beginning with</p> <p>3 Interoffice Memorandum dated</p> <p>4 January 24, 1990 is marked Exhibit</p> <p>5 Number 8 for Identification.)</p> <p>6 Q. I'm handing you what has been marked Litle</p> <p>7 8, which appears to be an Interoffice</p> <p>8 Memorandum from you to John Shirey and</p> <p>9 copied, Steve Tritman, dated January 24,</p> <p>10 1990, and the subject is "New Product -</p> <p>11 Postage Advance." Is that right?</p> <p>12 A. Yeah.</p> <p>13 Q. Have you seen this letter before?</p> <p>14 A. Yes. I wrote it.</p> <p>15 Q. Could you tell me what this letter relates</p> <p>16 to?</p> <p>17 A. I guess this -- this was an internal memo</p> <p>18 talking about a Postage Advance Program that</p> <p>19 I had been thinking about and talking to</p> <p>20 Exposures, actually, about.</p> <p>21 Q. And it appears that you attached a letter</p> <p>22 from you to Allen Abbott on Page 3, which is</p> <p>23 LI00065 --</p> <p>24 A. That's right.</p> <p>25 Q. -- dated December 27, 1989?</p>
<p style="text-align: right;">Page 99</p> <p>1 of the merchant?</p> <p>2 MR. EDELMAN: Objection. Leading.</p> <p>3 A. Yes. That's true.</p> <p>4 Q. How would FNBL forward those payments to</p> <p>5 Litle & Company? I'm sorry. Forward the</p> <p>6 payments pursuant to the schedule and the</p> <p>7 Demand Promissory Note in Litle 7?</p> <p>8 A. It would either be by wire or by ACH. The</p> <p>9 bulk payments -- the wires to us, I don't</p> <p>10 remember whether they were wire or ACH, but</p> <p>11 they were some form of electronic payment.</p> <p>12 Q. What was a typical percentage of credit card</p> <p>13 receivables that you would instruct FNBL to</p> <p>14 forward to Litle & Company?</p> <p>15 MR. EDELMAN: Objection. Vague and</p> <p>16 ambiguous. Lack of foundation.</p> <p>17 A. I don't think there was a typical. It</p> <p>18 varied a lot. I don't think it would have</p> <p>19 ever been less than five percent and ever,</p> <p>20 obviously, more than a hundred percent, but</p> <p>21 that was the range.</p> <p>22 Q. Somewhere between five and a hundred</p> <p>23 percent; right?</p> <p>24 A. Right, and it might have been less than</p> <p>25 that, too. I can't imagine we would have</p>	<p style="text-align: right;">Page 101</p> <p>1 A. Yeah. Wow, it went back quite a way, didn't</p> <p>2 it.</p> <p>3 Q. Had you engaged in any postage advances</p> <p>4 prior to this letter to Exposures?</p> <p>5 A. No.</p> <p>6 Q. If you look at the last page of the exhibit,</p> <p>7 which is LI00067, it has an Excel</p> <p>8 spreadsheet or a spreadsheet?</p> <p>9 A. Yeah.</p> <p>10 Q. Could you describe what the spreadsheet</p> <p>11 contains?</p> <p>12 A. Yeah. I'll have to study it, but in</p> <p>13 general, what it did is, it outlined my then</p> <p>14 concept of how the postage financing would</p> <p>15 work, including what the fees would be and</p> <p>16 how we would collect our fee -- or for</p> <p>17 example advance, what the example advance</p> <p>18 would be, how we would collect our fee, how</p> <p>19 we would get paid back for the advance.</p> <p>20 Q. Does this show how, as Litle & Company</p> <p>21 received payments -- or would receive</p> <p>22 payments from FNBL, the merchant's</p> <p>23 outstanding balance would be paid down? If</p> <p>24 you look at Column E.</p> <p>25 A. Yes. In fact, Column E is what the</p>

<p style="text-align: right;">Page 102</p> <p>1 principal balance outstanding is, and there</p> <p>2 are actually two examples here, I guess.</p> <p>3 Q. What are the different examples?</p> <p>4 A. I'm trying to review this quickly, but one</p> <p>5 looks like it's a postage advance of</p> <p>6 \$90,000, and the other looks like a postage</p> <p>7 advance of \$150,000. There may be different</p> <p>8 repayment schedules. I'm not sure. It</p> <p>9 looks like it's trying to figure out how</p> <p>10 long the money would be outstanding in a</p> <p>11 typical -- for a catalog or with these</p> <p>12 parameters in the collection. I notice that</p> <p>13 we were collecting our fee here as we</p> <p>14 collect our principal, but that was too</p> <p>15 complicated and we eventually just added it</p> <p>16 to the principal as a fixed amount.</p> <p>17 Q. Was there a typical length of time a</p> <p>18 merchant had to repay the cash advance?</p> <p>19 A. I think this was an analysis of how long we</p> <p>20 thought it would be, and I remember coming</p> <p>21 to the conclusion it would be about a six or</p> <p>22 eight-week payback, and I suspect that this</p> <p>23 had something to do with that analysis.</p> <p>24 Q. Does that apply to all postage advances that</p> <p>25 Litle & Company made?</p>	<p style="text-align: right;">Page 104</p> <p>1 through -- well, how does the process you've</p> <p>2 drawn on the board change for a reserve</p> <p>3 account, if at all?</p> <p>4 A. A reserve account is a separate account that</p> <p>5 we kept at First National Bank of</p> <p>6 Louisville. At some point prior to that</p> <p>7 point, we kept it in our own bank account.</p> <p>8 Again, that was because of Visa regulations</p> <p>9 that it changed, but that was a separate</p> <p>10 account in which we held our merchants'</p> <p>11 money against possible losses or against</p> <p>12 chargeback liability, and the reserve was</p> <p>13 another way, which I didn't mention before,</p> <p>14 but another way that money was transferred</p> <p>15 from the First National Bank of Louisville,</p> <p>16 general account, to the reserve, if we were</p> <p>17 increasing the reserve, or it was</p> <p>18 transferred from the reserve account back to</p> <p>19 the First of Louisville distribution</p> <p>20 account, and then distributed to the</p> <p>21 merchant. So that was -- so we instructed</p> <p>22 First of Louisville to transfer money</p> <p>23 between those two accounts and the reserve</p> <p>24 account was held on behalf of the merchant.</p> <p>25 No. It was an account -- I don't know when</p>
<p style="text-align: right;">Page 103</p> <p>1 A. Yes, because the -- when a catalog is</p> <p>2 mailed, the response curve for virtually all</p> <p>3 catalogs are similar, and of course, we had</p> <p>4 the experience because we had been in the</p> <p>5 catalog business for ten years.</p> <p>6 Q. And the response curve, what is that?</p> <p>7 A. The response curve is, if you mail on day</p> <p>8 one, how much business do you get on each</p> <p>9 day subsequent to that, going out 90 days,</p> <p>10 and after that, there's some residual amount</p> <p>11 remaining, but if you plot that on a graph,</p> <p>12 all the graphs for every catalog look about</p> <p>13 the same.</p> <p>14 Q. I'd like to refer you back to Litle Exhibit</p> <p>15 4, which is the Member Agreement --</p> <p>16 A. Yeah.</p> <p>17 Q. -- dated or signed in May or June of 1992,</p> <p>18 as shown on LI00029. Could you please turn</p> <p>19 to page that's marked LI00020?</p> <p>20 A. Yeah.</p> <p>21 Q. In the left column, at the top, it says "4.</p> <p>22 Reserve"?</p> <p>23 A. Yes.</p> <p>24 Q. You briefly described what a reserve account</p> <p>25 is earlier, and I'd like you to walk us</p>	<p style="text-align: right;">Page 105</p> <p>1 this changed, but it was an account for the</p> <p>2 benefit of Litle. The money in the merchant</p> <p>3 account at sometime was considered merchant</p> <p>4 money. These days, it's considered not</p> <p>5 merchant money, a merchant receivable, but</p> <p>6 it's held there to -- as a reserve against</p> <p>7 potential chargeback liability.</p> <p>8 Q. Is it the same account to which FNBL would</p> <p>9 forward credit card payments to the</p> <p>10 merchant?</p> <p>11 A. No.</p> <p>12 Q. Is it the same account to which FNBL would</p> <p>13 forward processing fees to Litle & Company?</p> <p>14 A. No.</p> <p>15 Q. What types of reserve accounts are there?</p> <p>16 Let me rephrase. Sorry. What type of</p> <p>17 reserve agreement -- what are the different</p> <p>18 types of reserve agreements?</p> <p>19 A. Well, one of the things a payment processor</p> <p>20 has is total control over that. So you</p> <p>21 know, on the fly, after the merchant signs</p> <p>22 this, if we deem ourselves insecure, we can</p> <p>23 invent any kind of reserve requirement</p> <p>24 that's necessary. Merchants often complain</p> <p>25 loudly about that, but there are different</p>

<p style="text-align: right;">Page 106</p> <p>1 kinds. Sometimes we take an amount of money</p> <p>2 or we have transferred to the reserve</p> <p>3 account, and the only transfers really are</p> <p>4 between the distribution account and the</p> <p>5 reserve account and the reserve account back</p> <p>6 to the distribution account.</p> <p>7 Q. What is the distribution account?</p> <p>8 A. That is the First of Louisville account</p> <p>9 that's involved in Z there, but the</p> <p>10 different kinds of reserves is really how</p> <p>11 it's paid and how it's returned to the</p> <p>12 merchant. Sometimes it's paid in lump sum</p> <p>13 and it just sits there. Sometimes it's a</p> <p>14 percentage of the prior day's -- the prior</p> <p>15 day's gross sales, typically not net</p> <p>16 sales -- gross sales, and it builds up to</p> <p>17 some number and then stops building up.</p> <p>18 Sometimes it's something we call a rolling</p> <p>19 reserve, which is a percentage of every</p> <p>20 day's gross sales, and then let's say it's a</p> <p>21 six-month rolling reserve, 180 days later,</p> <p>22 the merchant gets back the money they put in</p> <p>23 originally, but on the same day, they pay</p> <p>24 the percentage of that day's sales. So the</p> <p>25 rolling reserve tends to go up and down with</p>	<p style="text-align: right;">Page 108</p> <p>1 \$75,000.</p> <p>2 Q. And you said withdrawals from the reserve</p> <p>3 account might be made by FNBL, in the case</p> <p>4 of chargebacks, for example?</p> <p>5 A. No. What happened is, the reserve account</p> <p>6 just sat there. The only time it changed</p> <p>7 was if we said "Put some more money in the</p> <p>8 reserve account from the distribution</p> <p>9 account" or "Put some money from the reserve</p> <p>10 account into the distribution account."</p> <p>11 Chargebacks were actually netted against the</p> <p>12 proceeds we would send to the merchant in</p> <p>13 Step Z. So chargebacks were deducted from</p> <p>14 the normal distribution account, unless</p> <p>15 there was nothing there, and then we'd go to</p> <p>16 the reserve account.</p> <p>17 Q. Okay. In the situation where net proceeds</p> <p>18 was zero or too small to cover the</p> <p>19 chargebacks --</p> <p>20 A. That's right.</p> <p>21 Q. -- FNBL would withdraw money from the</p> <p>22 reserve account?</p> <p>23 A. Based on our instruction. They didn't know</p> <p>24 that somebody had net proceeds of less than</p> <p>25 zero. They didn't know any of that stuff.</p>
<p style="text-align: right;">Page 107</p> <p>1 the volume of the merchant's business.</p> <p>2 There are all kinds of -- sometimes it's a</p> <p>3 reserve that the merchant discovers that</p> <p>4 they didn't get any money that day because</p> <p>5 their chargebacks, based on our measurements</p> <p>6 and our risk analysis, says that we're going</p> <p>7 to get a hit. Sometimes we find out the</p> <p>8 merchant isn't paying their merchandise</p> <p>9 bills because they don't have enough cash</p> <p>10 and then we have to protect ourselves.</p> <p>11 Q. Did Litle & Company ever require a merchant</p> <p>12 to maintain a rolling reserve account?</p> <p>13 A. Yeah, I think so. I can't remember when the</p> <p>14 first -- yeah, sure. That's not an unusual.</p> <p>15 Q. If you look at page LI00026 of Litle 4, the</p> <p>16 bottom section of the page, it says "Net</p> <p>17 chargeback reserve: Minimum net chargeback</p> <p>18 reserve, \$75,000." Could you explain what</p> <p>19 that means?</p> <p>20 A. Oh, in this case, we had -- it looked like</p> <p>21 we had a reserve of \$75,000 in our</p> <p>22 reserve -- in the First of Louisville</p> <p>23 reserve account at all times, and I don't</p> <p>24 remember what -- how we put it in there, but</p> <p>25 obviously, this says it wouldn't go below</p>	<p style="text-align: right;">Page 109</p> <p>1 Q. If you instructed FNBL to deposit money into</p> <p>2 the reserve account, where would that money</p> <p>3 come from?</p> <p>4 A. It would come from the -- typically, from</p> <p>5 the distribution account because we</p> <p>6 typically had a deal where the merchant</p> <p>7 could build up the reserve account; and so</p> <p>8 we would take it out of their net proceeds</p> <p>9 to build it up in the reserve account.</p> <p>10 Sometimes, if we took on a new merchant that</p> <p>11 we required a reserve right away, they would</p> <p>12 wire the money to the reserve account -- no,</p> <p>13 they wouldn't wire the money to the reserve</p> <p>14 account. They typically wired it to the</p> <p>15 distribution account, and then we'd put it</p> <p>16 in the reserve account. Maybe they -- in</p> <p>17 that case, that would be one of the few</p> <p>18 places that I could imagine a check would be</p> <p>19 used in this whole process, but --</p> <p>20 Q. Only in the beginning, though, to create a</p> <p>21 balance?</p> <p>22 A. Yeah. It wasn't a routine thing. The</p> <p>23 reason they didn't wire directly in and out</p> <p>24 of the reserve, to my recollection, is we</p> <p>25 didn't want them to know what the reserve</p>

<p style="text-align: right;">Page 110</p> <p>1 account was. We didn't want them to see 2 what the routing numbers or have any idea to 3 you to find that money, if they decided they 4 wanted to get their reserve out without 5 letting us know. 6 Q. So am I correct saying that, if the reserve 7 account balance in the Museum Publications 8 of America, Exhibit 4, example, if that 9 account fell below \$75,000, Litle & Company 10 would instruct FNBL to forward a portion 11 of the net proceeds to the reserve account? 12 MR. EDELMAN: Objection. 13 A. Absolutely. 14 Q. FNBL would forward a portion of the reserve 15 proceeds to the reserve account and the 16 remaining portion to Museum Publications of 17 America? 18 A. That's right, unless we deducted some more 19 for postage financing or something like 20 that. 21 Q. And were each of those transfers electronic 22 transfers? 23 A. Yes. 24 Q. By wire or ACH? 25 A. Right. Even within First of Louisville, it</p>	<p style="text-align: right;">Page 112</p> <p>1 referenced in the Interoffice Memorandum, 2 Litle Exhibit 8? 3 A. Yes. 4 Q. And this agreement reflects the 5 negotiations -- or does this agreement 6 reflect the negotiations between you and 7 Allen Abbott? 8 A. Yes. 9 Q. Are there any differences between Litle 10 Exhibit 7 and Litle Exhibit 9, the two 11 promissory notes? Let me rephrase. Any 12 differences in the way the system worked or 13 the process. 14 A. Not really. There probably were slight 15 improvements between when we first did the 16 Exposures in the way the agreement was 17 written. I think, by that time, by 18 Exhibit 7, we made it clear we were 19 collecting our fee first, for example, and 20 there probably were mostly contractual 21 differences, but the way the system actually 22 worked was identical. 23 Q. Is the Member Agreement referred to in Litle 24 Exhibit 9 substantially similar to the 25 Member Agreement in Litle Exhibit 4?</p>
<p style="text-align: right;">Page 111</p> <p>1 was an electronic transfer. I should add, 2 though, that when you say "Did they process 3 that from Museum Collections," it was, 4 again, all done in bulk. We had the 5 details. We said "This is how much it adds 6 up. Today, transfer this much out of the 7 distribution account into the reserve 8 account." 9 Q. Did you account internally for the balance 10 in that reserve account for each individual 11 merchant? 12 A. Yes. 13 MR. GRAY: One last thing before 14 the lunch break. 15 (Five-page document entitled 16 "Schedule E-1, Promissory Note for 17 Postage Advances" is marked Exhibit 18 Number 9 for Identification.) 19 Q. I'm handing you what has been marked Litle 20 Exhibit 9, which says "Schedule E-1, 21 Promissory Note for Postage Advances," 22 signed by Allen Abbott of Exposures; is that 23 correct? 24 A. That's right. 25 Q. And is this the same Exposures that's</p>	<p style="text-align: right;">Page 113</p> <p>1 A. Yes. 2 Q. And Litle Exhibit 9, does it describe the 3 process for postage advancing that you've 4 been testifying about today? 5 A. I don't know if it describes the whole 6 thing, but it certainly covers what I was 7 talking about. It doesn't describe the 8 whole thing, but it is the agreement that 9 goes with what I was describing. 10 Q. Okay. 11 MR. EDELMAN: We can discuss how to 12 proceed. It seems to me we should finish 13 questioning before lunch. 14 MR. SMITH: Do you want to go off 15 the record for a second? 16 (Discussion off the record.) 17 THE VIDEOGRAPHER: Off the record 18 at 12:07. 19 (Lunch recess.) 20 AFTERNOON SESSION 21 THE VIDEOGRAPHER: On the record at 22 1:15. 23 MR. GRAY: Before we get started, 24 I'll put this on the record, that I've asked 25 Denise to copy Pages 78 through 82 of the</p>

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1 September issue of "Inc., 500," which is
 2 marked Little Exhibit 2.
 3 I'd also like to mark the board as
 4 a Little Exhibit.
 5 MR. EDELMAN: I assume we got a
 6 good shot on the video of the board.
 7 MR. SMITH: I'd just like to note
 8 for the record that the diagram changed
 9 during different points of the testimony.
 10 So this is the final, today, version.
 11 (Diagram on white board marked
 12 Exhibit Number 10 for
 13 Identification.)
 14 (Discussion off the record.)
 15 MR. GRAY: Everyone approves.
 16 Q. (Cont'd. By Mr. Gray) One final question
 17 about reserve accounts, which we were
 18 talking about just before the break. As
 19 described in Little Exhibit 4, the Member
 20 Agreement, the reserve account -- was the
 21 reserve account a pre-existing obligation
 22 for the merchant?
 23 MR. SMITH: Objection.
 24 A. It was an obligation for the merchant to
 25 fund it, yes, if that's your question.

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1 Q. It is the question, and is that pursuant to
 2 the Member Agreement, Exhibit 4?
 3 A. Yes. Yes, it is.
 4 Q. Also, to clarify, Little Exhibit 10, the
 5 chart on the board, in a transaction where
 6 the card is present, could you explain one
 7 more time what changes about the diagram?
 8 A. About the diagram itself, nothing changes.
 9 How the authorizations are obtained and how
 10 the settlement is made for a card-present is
 11 generally done through a terminal that is a
 12 card swipe terminal.
 13 Q. For the card-present transactions?
 14 A. For the card-present transactions.
 15 Sometimes it's done through a cash register
 16 that's connected to a central computer.
 17 There are all kinds of ways of doing it, but
 18 at some point in time, the card is present
 19 in the transaction, where most of the
 20 transactions that we did, but certainly not
 21 all, the card wasn't present in the
 22 transaction, so the information, instead of
 23 being obtained by a card swipe, was obtained
 24 because somebody keyed it into a port or
 25 entry terminal.

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1 Q. Earlier, you mentioned that FNBL will
 2 sometimes pay fulfillment centers; is that
 3 correct?
 4 A. Yes. The Z leg of that diagram, instead of
 5 going to a merchant, we'd instruct them to
 6 wire money to fulfillment centers.
 7 Q. Would you instruct them to wire the entire
 8 amount or a portion of it?
 9 A. It depended -- no. In that case, it was
 10 virtually always. I don't remember any
 11 exceptions, but it was a portion of the
 12 amount that was an approximation for the
 13 per-order value of their fulfillment
 14 services. They would true it up at the end
 15 of the month, typically.
 16 Q. In that situation, would FNBL electronically
 17 forward a portion of the credit card
 18 receivables, of the net proceeds, to the
 19 fulfillment center?
 20 A. Based on our instruction, and all they knew
 21 was that it was a bank account. They didn't
 22 know whether it was a fulfillment center or
 23 who it was, but the answer is yes.
 24 Q. And the remaining portion, would FNBL
 25 electronically forward that to the catalog

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1 company?
 2 A. Yes.
 3 Q. So the fulfillment center would be the third
 4 party in Step X in your chart, Little Exhibit
 5 10?
 6 A. Yes.
 7 Q. And did you say you had about 12 catalog
 8 companies?
 9 A. I don't really remember. It was between ten
 10 and 20, probably. Something like that, that
 11 actually used those services. We certainly
 12 talked about it to other companies that may
 13 have decided not to use the service or
 14 something.
 15 Q. But 12 of those companies used your services
 16 of diverting a portion of the funds to the
 17 fulfillment center --
 18 MR. EDELMAN: Objection. Asked and
 19 answered.
 20 Q. -- is that correct?
 21 A. I would say it's approximately 12. I don't
 22 know the number and have no way of figuring
 23 that out, exactly.
 24 Q. We talked a little bit earlier about a
 25 merchant renting or purchasing equipment.

30 (Pages 114 to 117)

<p style="text-align: right;">Page 118</p> <p>1 A. Right.</p> <p>2 Q. And would the merchant sometimes purchase or</p> <p>3 rent that equipment from a third party?</p> <p>4 A. They may have. I don't remember that</p> <p>5 happening very often, but it might have</p> <p>6 happened. We use NPC as a third party to</p> <p>7 manage the whole terminal process on our</p> <p>8 behalf, and maybe I would consider them a</p> <p>9 third party. It didn't have to be NPC. It</p> <p>10 could have been anybody.</p> <p>11 Q. So if the merchant would have rented or did</p> <p>12 rent or purchase equipment, such as a credit</p> <p>13 card terminal, then you could -- Litle &</p> <p>14 Company could have instructed FNBL to divert</p> <p>15 a portion of the credit card payments?</p> <p>16 A. That's right.</p> <p>17 Q. And would those payments have been sent</p> <p>18 electronically?</p> <p>19 MR. EDELMAN: Objection.</p> <p>20 Incomplete, hypothetical, lack of</p> <p>21 foundation.</p> <p>22 A. The payments would have been deducted from</p> <p>23 the Z leg there, and so the merchant would</p> <p>24 have gotten the net amount after those</p> <p>25 payments were deducted.</p>	<p style="text-align: right;">Page 120</p> <p>1 us. So you're really getting convoluted,</p> <p>2 but -- yeah. Actually, what we would have</p> <p>3 done was had First of Louisville transfer</p> <p>4 money to NPC's account, which would have</p> <p>5 been another account in First of Louisville</p> <p>6 that NPC owned.</p> <p>7 Q. Okay. Would that money have been</p> <p>8 electronically forwarded?</p> <p>9 A. Yeah. It's all part of the ACH system, and</p> <p>10 the ACH system was so automated, and it is</p> <p>11 even more so now, that that's the way you</p> <p>12 make transfers between two accounts in the</p> <p>13 same bank on a regular basis.</p> <p>14 Q. And taking one step back to the fulfillment</p> <p>15 part that you described, the fulfillment</p> <p>16 situation with a catalog company --</p> <p>17 A. Yeah.</p> <p>18 Q. -- did Litle & Company instruct FNBL to</p> <p>19 forward a portion of the payment to the</p> <p>20 fulfillment center to satisfy an obligation</p> <p>21 of the merchant to the fulfillment center?</p> <p>22 A. Yeah. The merchant owed the fulfillment</p> <p>23 center, on a per-shipment basis, a fee, and</p> <p>24 so that's what we forwarded on the</p> <p>25 merchant's behalf to the fulfillment</p>
<p style="text-align: right;">Page 119</p> <p>1 Q. Can you think of any examples of a third</p> <p>2 party who would have rented or sold that</p> <p>3 equipment, such as a terminal, to the</p> <p>4 merchant?</p> <p>5 A. Yeah. NPC did that. That was one of the</p> <p>6 things they did. NDC, which is on there,</p> <p>7 too, did that. Today's Global Payments,</p> <p>8 they did that. Virtually, every payment</p> <p>9 processor that was in the card-present</p> <p>10 world, which was virtually every payment</p> <p>11 processor there was, other than us, had</p> <p>12 terminal functions. There were separate</p> <p>13 companies -- I don't remember their names --</p> <p>14 but I know that there were separate</p> <p>15 companies that that's all they did. They</p> <p>16 rendered and serviced terminals, and the</p> <p>17 major asset they had was somebody in every</p> <p>18 metropolitan area that could go and replace</p> <p>19 a broken terminal within 20 minutes.</p> <p>20 Q. In the situation where NDC provided the</p> <p>21 terminal, would Litle & Company instruct</p> <p>22 FNBL to pay a portion of the net proceeds to</p> <p>23 NPC?</p> <p>24 A. That was a little more complicated. NDC was</p> <p>25 actually -- their bills came through NPC to</p>	<p style="text-align: right;">Page 121</p> <p>1 center.</p> <p>2 Q. And how did you know what portion that</p> <p>3 should be?</p> <p>4 A. We didn't know exactly. What we did is we</p> <p>5 made an approximation that usually was some</p> <p>6 fixed amount, plus a percentage of the</p> <p>7 transaction. So any transactions we'd</p> <p>8 settle, we would send four dollars, plus</p> <p>9 four percent of the face value to the</p> <p>10 fulfillment center. Obviously, that wasn't</p> <p>11 the exact amount, and at the end of a month,</p> <p>12 say -- I think that's typically how they did</p> <p>13 it -- the merchant and the fulfillment</p> <p>14 company would true up whatever differential</p> <p>15 there was at the end of the month.</p> <p>16 Q. Were those fees outlined in the three-party</p> <p>17 agreement you mentioned earlier?</p> <p>18 A. Yeah, and they could change -- and they</p> <p>19 changed as people discovered that the</p> <p>20 approximation was a little higher or a</p> <p>21 little low.</p> <p>22 Q. What else was included in the three-party</p> <p>23 agreement?</p> <p>24 A. The obligation for the fulfillment company,</p> <p>25 a performance obligation, as we talked about</p>

<p style="text-align: right;">Page 122</p> <p>1 it, and the performance obligation was</p> <p>2 something that the fulfillment company is</p> <p>3 legally required to do anyway, and that is,</p> <p>4 don't charge the customer until the goods</p> <p>5 are shipped.</p> <p>6 Q. What are the obligations of the catalog</p> <p>7 company?</p> <p>8 A. In what sense?</p> <p>9 Q. In the three-party agreement, did the</p> <p>10 merchant have any obligations to the</p> <p>11 fulfillment company?</p> <p>12 A. The merchant had to pay the fulfillment</p> <p>13 company for their services.</p> <p>14 Q. And the obligations of Litle & Company?</p> <p>15 A. We had to pay the fulfillment company on</p> <p>16 behalf of the merchant and we had our normal</p> <p>17 obligations as -- for routine payment</p> <p>18 processing, as well.</p> <p>19 Q. That were outlined in the Member Agreement?</p> <p>20 A. Yes.</p> <p>21 (One-page document entitled "US</p> <p>22 6,941,281 B1" is marked Exhibit</p> <p>23 Number 11 for Identification.)</p> <p>24 Q. I'm handing you what has been marked Litle</p> <p>25 Exhibit 11, which are the claims of United</p>	<p style="text-align: right;">Page 124</p> <p>1 prepared with two columns. The left column</p> <p>2 lists the claims of the patent, which is the</p> <p>3 claims on Litle Exhibit 11 that you just</p> <p>4 read, 1 and 10, as well as all the other</p> <p>5 claims which are printed in the left column,</p> <p>6 and in the right column, we've cited to</p> <p>7 portions of the Litle documents that you've</p> <p>8 testified here today that refer to the</p> <p>9 elements of the claim that are listed in the</p> <p>10 left-hand column, and what I'd like to ask</p> <p>11 you to do is -- we'll go through this row by</p> <p>12 row and I'd like you to read the right-hand</p> <p>13 column, I'll read the left-hand column to</p> <p>14 you, and ask you to tell us if what we've</p> <p>15 cited in the right-hand column is accurate.</p> <p>16 MR. EDELMAN: Excuse me. Before</p> <p>17 you read that, can I have a representation</p> <p>18 as to whether this was provided --</p> <p>19 MR. GRAY: Yes, it was.</p> <p>20 MR. EDELMAN: It was provided when?</p> <p>21 MR. GRAY: Last week sometime.</p> <p>22 MR. EDELMAN: Okay.</p> <p>23 MR. SMITH: I'd like to note, we're</p> <p>24 not going to object to the line of</p> <p>25 questioning, certainly, but Mr. Litle is</p>
<p style="text-align: right;">Page 123</p> <p>1 States Patent 6941281. It shows -- it's</p> <p>2 just the last page of the Patent Column 7</p> <p>3 and 8.</p> <p>4 MR. EDELMAN: I'll object to the</p> <p>5 extent that you're excerpting a page from an</p> <p>6 entire patent and also not showing Mr. Litle</p> <p>7 the proposed construction of the terms of</p> <p>8 the patent, and also not show him the</p> <p>9 arguments the parties have made with the</p> <p>10 file list of the patent.</p> <p>11 Q. Okay, could you please read Claims 1 and 10</p> <p>12 to yourself?</p> <p>13 MR. SMITH: Just 1 and 10?</p> <p>14 Q. Just 1 and 10.</p> <p>15 A. All right.</p> <p>16 Q. Do you understand those two claims?</p> <p>17 MR. EDELMAN: Same objections.</p> <p>18 A. I think so.</p> <p>19 (Document entitled "Little & Co.,</p> <p>20 Invalidity Claim Chart, United</p> <p>21 States Patent No. 6,941,281" is</p> <p>22 marked Exhibit Number 12 for</p> <p>23 Identification.)</p> <p>24 Q. I'm handing you what has been marked Litle</p> <p>25 Exhibit 12, which is a chart that we have</p>	<p style="text-align: right;">Page 125</p> <p>1 here as a fact witness. He is not rendering</p> <p>2 a conclusion on patent validity. He is here</p> <p>3 simply to testify as a factual witness. I</p> <p>4 just wanted to make that clear before --</p> <p>5 MR. EDELMAN: And again, I want to</p> <p>6 object to the extent that this is being</p> <p>7 shown to Mr. Litle without the discussion of</p> <p>8 what the terms are construed to mean, or the</p> <p>9 parties' construction. It's misleading,</p> <p>10 putting the witness in an impossible</p> <p>11 situation. If you want to do it, go ahead.</p> <p>12 Q. You testified that you understand the terms</p> <p>13 that are used in the patent; is that</p> <p>14 correct?</p> <p>15 MR. EDELMAN: Same objections.</p> <p>16 A. Yeah, I think so, but if we get to some I</p> <p>17 don't understand, then I'll say that.</p> <p>18 Q. Please do. So on Page 1 of Litle Exhibit</p> <p>19 12, in the first row, the claim recites,</p> <p>20 "A method for automated payment,</p> <p>21 comprising."</p> <p>22 A. That's not exactly a complete sentence.</p> <p>23 Q. No, and what we've done, and the reason I</p> <p>24 had you read Claims 1 through 10, is because</p> <p>25 we have broken down the claims --</p>

<p style="text-align: right;">Page 126</p> <p>1 A. Okay.</p> <p>2 Q. -- and if you would like to refer back to</p> <p>3 Litle Exhibit 11, right there, you can read</p> <p>4 the full claim in context.</p> <p>5 A. Okay.</p> <p>6 Q. So "A method for automated payment," and</p> <p>7 what we've listed here are all the documents</p> <p>8 you've testified about today and stated</p> <p>9 "Litle & Company utilized a method for</p> <p>10 automated payments as repayment of</p> <p>11 obligations owed by merchants either for</p> <p>12 postage or cash advances." Is that correct?</p> <p>13 A. Yeah, and also, the reserves and something</p> <p>14 like the Hanover Direct obligation. The</p> <p>15 other kinds of obligations that we've talked</p> <p>16 about. So it isn't just for postage or cash</p> <p>17 advances.</p> <p>18 Q. Was the fulfillment center operation that</p> <p>19 you just testified about, was that a method</p> <p>20 of automated payment?</p> <p>21 A. To the fulfillment center?</p> <p>22 Q. Yes.</p> <p>23 A. Yes.</p> <p>24 Q. What about for the wire fee you discussed?</p> <p>25 A. For the what?</p>	<p style="text-align: right;">Page 128</p> <p>1 MR. EDELMAN: I can put my</p> <p>2 objections on the record.</p> <p>3 MR. SCHUURMAN: Well, make them</p> <p>4 short.</p> <p>5 MR. EDELMAN: I will make them as</p> <p>6 long as I want to make them.</p> <p>7 Q. Based on your understanding after being in</p> <p>8 the card processing industry for about 25</p> <p>9 years --</p> <p>10 A. More than that.</p> <p>11 Q. I'm sorry? Longer than that?</p> <p>12 MR. SMITH: 25-plus.</p> <p>13 Q. 25-plus years.</p> <p>14 MR. EDELMAN: Don't make him a</p> <p>15 patent attorney.</p> <p>16 Q. Do the --</p> <p>17 MR. GRAY: I'm sorry. Is that an</p> <p>18 objection?</p> <p>19 MR. EDELMAN: Yes, it is.</p> <p>20 MR. GRAY: I didn't hear</p> <p>21 "objection."</p> <p>22 MR. EDELMAN: Objection. It</p> <p>23 doesn't make him a patent attorney. Go</p> <p>24 ahead.</p> <p>25 MR. GRAY: Please limit your</p>
<p style="text-align: right;">Page 127</p> <p>1 Q. For the wire fee; was that a method for</p> <p>2 automated payment?</p> <p>3 A. Yes.</p> <p>4 Q. And was equipment -- payments for equipment</p> <p>5 rental and purchase, was that a method for</p> <p>6 automated payment?</p> <p>7 A. Yes.</p> <p>8 Q. Looking now at the second row of the first</p> <p>9 page of Litle 12, the claim says "At a</p> <p>10 merchant, accepting a customer identifier as</p> <p>11 payment from the customer." Can you look at</p> <p>12 the right-hand column and tell me whether or</p> <p>13 not those citations from the Litle documents</p> <p>14 show that a merchant accepted the customer</p> <p>15 identifier as payment from the customer?</p> <p>16 MR. EDELMAN: Objection. Calls for</p> <p>17 claim construction, beyond the scope of the</p> <p>18 testimony, misleading, lack of foundation.</p> <p>19 Q. I absolutely do not want you to try to</p> <p>20 construe the claims.</p> <p>21 MR. EDELMAN: He has to construe</p> <p>22 the claim to answer the question.</p> <p>23 MR. SCHUURMAN: Why don't you ask</p> <p>24 him during your cross and stop interfering.</p> <p>25 Go ahead.</p>	<p style="text-align: right;">Page 129</p> <p>1 objections to objections as to form.</p> <p>2 MR. EDELMAN: It was a beautiful</p> <p>3 objection as to form.</p> <p>4 Q. Okay. Does the right-hand column, does that</p> <p>5 recite citations to the documents you've</p> <p>6 testified about today that show a merchant</p> <p>7 accepts a customer identifier as payment</p> <p>8 from a customer?</p> <p>9 MR. EDELMAN: Same objection.</p> <p>10 Q. Please take as much time as you need.</p> <p>11 A. And the question is, at that time, did we</p> <p>12 accept the customer identifier as a payment</p> <p>13 for transaction, and the answer is we did.</p> <p>14 Q. The merchants did or Litle & Company did?</p> <p>15 A. The merchants accepted it.</p> <p>16 Q. As described in the quotes in this chart</p> <p>17 that you're reading?</p> <p>18 MR. EDELMAN: Same objection.</p> <p>19 A. Right.</p> <p>20 Q. Okay. Looking at the bottom row on Page 2</p> <p>21 of Litle Exhibit 12, the claim states "and</p> <p>22 electronically forwarding information</p> <p>23 related to the payment to a computerized</p> <p>24 merchant processor." Could you please tell</p> <p>25 me whether the cites in the right-hand</p>

<p style="text-align: right;">Page 130</p> <p>1 column illustrate that Litle & Company 2 electronically -- or that the merchant 3 electronically forwarded information related 4 to the payment to Litle & Company? 5 MR. EDELMAN: Objection. Calls for 6 claim construction, beyond beyond the scope 7 of the deposition, lack of foundation. 8 A. Yes. 9 Q. And to clarify, you said that using -- 10 pursuant to the Member Agreement, which is 11 Litle Exhibit 4, the merchant would accept 12 credit cards, debit cards, and charge cards, 13 such as an American Express card? 14 A. That's correct. 15 Q. And did you also testify that the merchant 16 would accept those cards using a telephone 17 and inputting the credit card number into a 18 computer? 19 A. That's one way, yes. 20 MR. EDELMAN: I just want to put an 21 objection on the record. It wasn't clear to 22 me -- vague and ambiguous as to which 23 merchants you're referring to. 24 Q. Which merchants would accept a credit card 25 via telephone?</p>	<p style="text-align: right;">Page 132</p> <p>1 needed for our process, and then the 2 settlement information might have gone to 3 NDC first and then through NPC, but it was 4 part of our contract, and the settlement 5 information sometimes then went directly to 6 us. Could go any one of those ways. 7 Q. Whether the card was present or not present, 8 was the information related to the payment, 9 such as the card number and the payment 10 amount -- 11 A. Yes. 12 Q. -- was that electronically forwarded? 13 A. Yes. In the card-not-present, it was always 14 directly forwarded to us. 15 Q. Electronically? 16 A. Yes. When it was card-not-present, it was 17 always forwarded electronically, but the 18 route that it took could vary, depending on 19 the circumstances. 20 Q. Okay. Thank you. On Page 3 of Litle 21 Exhibit 12, the next portion of the claim 22 states "at the computerized merchant 23 processor, acquiring the information related 24 to the payment from the merchant, 25 authorizing and settling the payment, and</p>
<p style="text-align: right;">Page 131</p> <p>1 A. That's how the card-not-present merchants 2 received most of their transactions. When 3 they didn't receive them by telephone was 4 when they -- or by an order blank sent 5 through the mail. It was typically at a 6 warehouse sale or something like that. Then 7 they were operating just like a normal 8 retailer operating. 9 Q. And was the process by which those merchants 10 forwarded information, such as the card, 11 information and payment amount, to Litle & 12 Company in the authorization step in Litle 13 10, was that process different for 14 card-not-present or card-present 15 transactions? 16 A. How they actually forwarded the information 17 to us? Yeah. Actually, sometimes we got 18 the settlement information -- well, the 19 authorization process might not -- I can't 20 remember. It depended on the situation. 21 Might not have actually gone through us, but 22 we were responsible for it. It might have 23 gone directly to NDC, and then that 24 information would have come to us through 25 NDC, the authorization information, which we</p>	<p style="text-align: right;">Page 133</p> <p>1 forwarding at least a portion of the payment 2 to a computerized payment receiver as 3 payment of at least a portion of an 4 obligation made by the merchant." 5 A. Uh-huh. 6 Q. Could you please read the citations in the 7 right-hand column, and it flows over on to 8 Page 4 and 5, and tell me whether that 9 accurately recites the portions of the 10 agreements you've testified to today. 11 MR. EDELMAN: I'm sorry. Was your 12 question getting at whether it reflects the 13 language of the Claim 10? 14 MR. GRAY: No. I asked whether it 15 accurately reflects -- 16 MR. EDELMAN: Reflects the 17 agreements. 18 Q. Do you understand my question? 19 A. Yeah. You are asking -- I'll read it back. 20 As I understand it, you're asking me to look 21 at the citations and without trying to 22 interpret whether they comply with the 23 patent or not, you're asking whether those 24 citations are accurate. Is that true? 25 Q. Right.</p>

<p style="text-align: right;">Page 134</p> <p>1 MR. EDELMAN: That's fine.</p> <p>2 A. I have a question. In the first sentence,</p> <p>3 it says, at the end, "Management fee to</p> <p>4 Litle & Company, or order." I'm not sure</p> <p>5 that's either what it says or what it should</p> <p>6 have said.</p> <p>7 Q. I believe that is what it says. That's</p> <p>8 Litle Exhibit 7, I believe?</p> <p>9 MR. EDELMAN: I'm sorry. Where is</p> <p>10 the witness referring?</p> <p>11 MR. GRAY: The bottom of Page 3,</p> <p>12 the bottom paragraph in the right column,</p> <p>13 the fourth line down.</p> <p>14 MR. EDELMAN: Oh, I see it.</p> <p>15 Thanks.</p> <p>16 A. Yeah, I think that was a typo and it should</p> <p>17 have probably said -- it should have</p> <p>18 probably referred to what we were thinking</p> <p>19 of setting up or maybe had set up as a</p> <p>20 separate operation to do postage financing.</p> <p>21 Q. Okay. Outside of Litle & Company?</p> <p>22 A. Right. Well, it would have been owned by</p> <p>23 roughly the same people, but it would have</p> <p>24 been a separate operation.</p> <p>25 Q. Do you have any other questions about the</p>	<p style="text-align: right;">Page 136</p> <p>1 differently.</p> <p>2 MR. SMITH: He knows too well.</p> <p>3 MR. EDELMAN: Objection.</p> <p>4 A. And then they charge you for it.</p> <p>5 Q. Your understanding, though, as someone who</p> <p>6 has been in the payment processing</p> <p>7 industry for 25-plus years.</p> <p>8 A. I would say I understand what the left-hand</p> <p>9 column is getting at and the right-hand</p> <p>10 column is a reflection of exactly that --</p> <p>11 Q. Okay.</p> <p>12 A. -- and matches what our documentation was.</p> <p>13 Q. And I'm going to be asking the same</p> <p>14 questions about each row going throughout</p> <p>15 this document. So beginning on Page 5,</p> <p>16 would you please read the citations in the</p> <p>17 right column?</p> <p>18 A. The question is the same; is this an</p> <p>19 accurate representation?</p> <p>20 Q. Yes.</p> <p>21 A. Yes, it is.</p> <p>22 Q. Do those citations accurately reflect your</p> <p>23 understanding of the description in the</p> <p>24 left-hand column?</p> <p>25 MR. EDELMAN: Same objections.</p>
<p style="text-align: right;">Page 135</p> <p>1 citations in the right column?</p> <p>2 A. Yeah. I'd like to look at the definition of</p> <p>3 "prepayments."</p> <p>4 Q. That's in the Member Agreement?</p> <p>5 A. Okay. Yes, that's accurate.</p> <p>6 Q. Do all these citations on Pages 3 through 5</p> <p>7 accurately reflect your understanding of</p> <p>8 what the language in the left column</p> <p>9 requires?</p> <p>10 MR. EDELMAN: Same objections.</p> <p>11 A. As I understand it, yes.</p> <p>12 Q. And do you have any questions about what</p> <p>13 that -- do you understand what the claim</p> <p>14 language in the left-hand column is on those</p> <p>15 pages?</p> <p>16 MR. EDELMAN: Same objection.</p> <p>17 MR. SMITH: Objection. I think</p> <p>18 "claim language" is misleading. He can</p> <p>19 talk about what the words say, but "claim</p> <p>20 language" is a big problem.</p> <p>21 Q. The language that's printed in the left-hand</p> <p>22 column, do the right-hand citations</p> <p>23 accurately reflect your understanding?</p> <p>24 A. As a layman's understanding because lawyers</p> <p>25 always interpret stuff a little</p>	<p style="text-align: right;">Page 137</p> <p>1 A. Yes. I understand the computer payment</p> <p>2 receiver as what I call the third party, and</p> <p>3 if that's the case, yes, it does accurately</p> <p>4 reflect it.</p> <p>5 Q. Looking at the next row, and the left-hand</p> <p>6 column begins with the Number 2 --</p> <p>7 A. Uh-huh.</p> <p>8 Q. -- it says "The method of claim 1 wherein</p> <p>9 the accepting step comprises accepting a</p> <p>10 credit card number as the customer</p> <p>11 identifier." Could you please look at</p> <p>12 what's cited in the right-hand column and</p> <p>13 tell me if that accurately reflects the</p> <p>14 Litle documents and -- well, if it</p> <p>15 accurately reflects that Litle accepted</p> <p>16 credit card numbers? Sorry. Let me start</p> <p>17 over. That the merchants who processed</p> <p>18 through Litle accepted credit card numbers.</p> <p>19 MR. EDELMAN: Same objections.</p> <p>20 MR. SMITH: Do you understand that</p> <p>21 question?</p> <p>22 THE WITNESS: I think so.</p> <p>23 Q. Let me rephrase. Sorry. Could you look at</p> <p>24 the citations in the right-hand column and</p> <p>25 tell me whether those citations accurately</p>

<p style="text-align: right;">Page 138</p> <p>1 illustrate that Litle & Company processed</p> <p>2 credit card transactions for merchants?</p> <p>3 MR. EDELMAN: Same objections.</p> <p>4 A. Yes. That was our service, processing</p> <p>5 credit cards for merchants.</p> <p>6 Q. And on Page 6 of Litle Exhibit 12, the</p> <p>7 bottom row begins with the number 3, could</p> <p>8 you please look at the right-hand column</p> <p>9 and, disregarding the first paragraph,</p> <p>10 please tell me whether those citations --</p> <p>11 A. Disregarding the first paragraph?</p> <p>12 Q. Right, disregarding, and was your testimony</p> <p>13 earlier that Litle would process debit cards</p> <p>14 on behalf of merchants?</p> <p>15 A. Yes, but they weren't necessarily identified</p> <p>16 as debit cards.</p> <p>17 Q. Right.</p> <p>18 A. In fact, they were necessarily by the</p> <p>19 payment networks disguised as debit cards.</p> <p>20 Q. Could you please read the citations to the</p> <p>21 documents and tell me whether those</p> <p>22 citations showed that Litle accepted debit</p> <p>23 cards -- sorry -- that Litle processed</p> <p>24 transactions where debit cards were used at</p> <p>25 the merchant?</p>	<p style="text-align: right;">Page 140</p> <p>1 computer chip on them that did something.</p> <p>2 There are cards now that carry changing</p> <p>3 passwords on it, sort of like an RSA</p> <p>4 password. There are cards that you can</p> <p>5 stick your thumb over and it can identify</p> <p>6 the fact that your thumb print is really</p> <p>7 your thumb print and not somebody else's. A</p> <p>8 Smart Card encompasses all kinds of stuff.</p> <p>9 A Smart Card typically had to be used in</p> <p>10 conjunction with some sort of terminal</p> <p>11 device. So we didn't handle any Smart Cards</p> <p>12 that I know, except that it's also my</p> <p>13 understanding that some Smart Cards had Visa</p> <p>14 or MasterCard identification numbers on</p> <p>15 them, and if that case, if somebody gave</p> <p>16 those Visa and MasterCard identification</p> <p>17 numbers over the telephone as a</p> <p>18 card-not-present card, we would handle it</p> <p>19 like we'd handle any other credit card,</p> <p>20 although we wouldn't necessarily know it was</p> <p>21 a Smart Card.</p> <p>22 Q. Could you look at Page 8 of Litle Exhibit</p> <p>23 12, the very bottom line, and Page 9, and</p> <p>24 tell me whether the citations to the Litle</p> <p>25 documents in the right-hand column</p>
<p style="text-align: right;">Page 139</p> <p>1 MR. EDELMAN: Same objections.</p> <p>2 A. And the question again, is?</p> <p>3 Q. Whether these citations in the right-hand</p> <p>4 column illustrate that Litle would process</p> <p>5 debit card transactions for merchants.</p> <p>6 A. Yes.</p> <p>7 Q. Do you know what a Smart Card is?</p> <p>8 A. Yes.</p> <p>9 Q. What is a Smart Card?</p> <p>10 A. It's typically a card with a chip on it that</p> <p>11 carries information about an individual. In</p> <p>12 those days, they were talking about Smart</p> <p>13 Cards carrying your medical history and all</p> <p>14 kinds of stuff on it, and so they would have</p> <p>15 represented a distributor database of a</p> <p>16 hundred million nodes, which was in my view</p> <p>17 ridiculous, and I said so on regular</p> <p>18 occasions in front of a bunch of credit card</p> <p>19 people. Now, it's really become a card that</p> <p>20 carries personal identification</p> <p>21 information. So a Smart Card is usually an</p> <p>22 identification device. Prepaid phone cards</p> <p>23 could be considered Smart Cards because they</p> <p>24 stored information on them, but I always</p> <p>25 looked at Smart Cards as those that had a</p>	<p style="text-align: right;">Page 141</p> <p>1 illustrate that Litle processed charge card</p> <p>2 transactions for its merchants.</p> <p>3 MR. EDELMAN: Same objections as</p> <p>4 before.</p> <p>5 A. Yes.</p> <p>6 Q. And on the row that's numbered 6, would you</p> <p>7 please read the citations in the right-hand</p> <p>8 column and tell me whether that accurately</p> <p>9 illustrates that the merchants for whom</p> <p>10 Litle would process transactions would</p> <p>11 sometimes accept credit cards at their</p> <p>12 warehouse sales or otherwise at the merchant</p> <p>13 location?</p> <p>14 MR. EDELMAN: Same objections.</p> <p>15 A. Well, interestingly enough,</p> <p>16 card-not-present, based on the Visa and</p> <p>17 MasterCard regulations, the</p> <p>18 card-not-presents were accepted at the</p> <p>19 merchant location that was their office or</p> <p>20 the place where they were accepting orders,</p> <p>21 and that location, I think in those days, it</p> <p>22 changed, had to be identified, by city and</p> <p>23 state. So that was true with</p> <p>24 card-not-present, but card present is more</p> <p>25 obvious. Card-presents were done -- one of</p>

<p style="text-align: right;">Page 142</p> <p>1 the things that I actually got Visa and</p> <p>2 MasterCard to do was to allow us, instead of</p> <p>3 putting the city and state as an identifier</p> <p>4 for where the card-not-present transactions</p> <p>5 came from, allowing them -- or now, it's a</p> <p>6 requirement -- to put the 800 number of the</p> <p>7 customer service number on it. I don't</p> <p>8 remember at this time whether the actual</p> <p>9 city and state was still required, but this</p> <p>10 was interestingly enough true for</p> <p>11 card-not-present, as well as card-present</p> <p>12 transactions.</p> <p>13 Q. On Page 10, Row 7, would you please tell me</p> <p>14 whether the right-hand column illustrates</p> <p>15 how merchants for whom Litle would process</p> <p>16 transactions would electronically accept</p> <p>17 cards?</p> <p>18 MR. EDELMAN: Same objections.</p> <p>19 MR. SMITH: It looks like, on some</p> <p>20 of this, there's some editorial, as well.</p> <p>21 So within the quotes is what came from the</p> <p>22 documents; is that right?</p> <p>23 MR. GRAY: Right.</p> <p>24 MR. SMITH: Are you asking him to</p> <p>25 verify what is in the parentheses?</p>	<p style="text-align: right;">Page 144</p> <p>1 it religiously and sometimes they didn't do</p> <p>2 so well, but --</p> <p>3 Q. And you earlier -- did you earlier testify</p> <p>4 that some of Litle & Company's merchants</p> <p>5 would have credit card terminals or card</p> <p>6 terminals at the merchant location?</p> <p>7 A. Yes, and we could always identify those</p> <p>8 transactions, because we'd get a terminal</p> <p>9 number and we knew which terminal it was</p> <p>10 used, and so we'd always know that was a</p> <p>11 card-present transaction. We didn't</p> <p>12 necessarily always know that a</p> <p>13 card-not-present transaction was a telephone</p> <p>14 order or a mail order, and I frankly don't</p> <p>15 think Visa and MasterCard cared about that.</p> <p>16 Q. How would you receive that information from</p> <p>17 the terminal?</p> <p>18 A. Well, it could take several routes, but</p> <p>19 electronically, the path that it took</p> <p>20 would -- could take several different</p> <p>21 routes. It could come right from the</p> <p>22 terminal to us. It could go from the</p> <p>23 terminal to NDC. It could go from the</p> <p>24 terminal to NPC, and I don't really remember</p> <p>25 all the ways, but we would change -- over</p>
<p style="text-align: right;">Page 143</p> <p>1 MR. GRAY: No.</p> <p>2 MR. SMITH: Okay. So just -- I</p> <p>3 just want to be --</p> <p>4 MR. GRAY: Well, actually, yes.</p> <p>5 Q. If we say it shows something, I'd like you</p> <p>6 to verify that the quote actually does</p> <p>7 show.</p> <p>8 MR. SMITH: Do you understand what</p> <p>9 they're asking?</p> <p>10 THE WITNESS: Yes.</p> <p>11 A. This is certainly what was said. The idea</p> <p>12 of actually identifying a sale as a mail</p> <p>13 order or a telephone order was often done,</p> <p>14 not necessarily always done. We'd identify</p> <p>15 each merchant or each sub-merchant by our</p> <p>16 internal merchant number that we had that</p> <p>17 the merchant also used. So anything that</p> <p>18 would come under one merchant number would</p> <p>19 be a mail order. Another sub-merchant</p> <p>20 number would be a telephone number. Another</p> <p>21 sub-merchant number would be a card-present</p> <p>22 transaction. We'd roll all that up and</p> <p>23 account for it as one merchant, but we could</p> <p>24 tell where the transactions came from,</p> <p>25 typically, and the merchants sometimes did</p>	<p style="text-align: right;">Page 145</p> <p>1 time, we would change the way we did that.</p> <p>2 For efficiency reasons, for cost reasons,</p> <p>3 for whatever reasons, we would change that,</p> <p>4 but we always received it electronically.</p> <p>5 We probably received some paper</p> <p>6 transactions, but I can't imagine, during</p> <p>7 the whole course of our company, we received</p> <p>8 more than a handful.</p> <p>9 Q. Looking at Row 8 on Page 10 of Litle Exhibit</p> <p>10 12, did Litle & Company ever instruct FNBL</p> <p>11 to accumulate payments until a certain</p> <p>12 amount is reached before forwarding</p> <p>13 payments?</p> <p>14 MR. EDELMAN: Objection. Calls for</p> <p>15 claim construction, mischaracterizes the</p> <p>16 claim.</p> <p>17 Q. Do you understand that language, Mr. Litle,</p> <p>18 "accumulate the payments"?</p> <p>19 MR. EDELMAN: Same objection.</p> <p>20 MR. SMITH: Well, I think it's a</p> <p>21 couple of questions. So do you want him to</p> <p>22 answer your question or do you want him to</p> <p>23 comment on the text that's written here next</p> <p>24 to --</p> <p>25 MR. GRAY: Comment on my question.</p>

<p style="text-align: right;">Page 146</p> <p>1 Q. You can disregard the text on the right-hand 2 side.</p> <p>3 MR. SMITH: Okay. Ignore what is 4 on the paper. Can you read the question 5 back, please.</p> <p>6 (The following question was read 7 back by the court reporter: 8 "Looking at Row 8 on Page 10 of 9 Little Exhibit 12, did Little & 10 Company ever instruct FNBL to 11 accumulate payments until a certain 12 amount is reached before forwarding 13 payments?")</p> <p>14 A. I'll answer that in two parts. The first 15 part is, we did accumulate transactions. 16 Some of our customers would send us -- 17 they'd go through a cycle every day. Some 18 of them would go through a cycle every ten 19 minutes, and based on the way transactions 20 are settled, you know, they're all settled 21 in a batch, that's all batch is today, even, 22 and we would settle them through the Visa 23 and MasterCard network. Also, multiple 24 times during the day, but somebody like 25 Micro Warehouse would send us batches every</p>	<p style="text-align: right;">Page 148</p> <p>1 gateway into the networks, and so we would 2 settle with them multiple times. Maybe we'd 3 only settle with them once. I don't 4 remember. I know when we were settling 5 directly through Visa and MasterCard, we did 6 settle with them multiple times.</p> <p>7 Now, we didn't -- the part of when 8 we would electronically transmit the data to 9 the merchants or the third parties, that was 10 kind of independent of that. The dollar 11 value would accumulate or the dollar value 12 would show up in the First National Bank of 13 Louisville account as a funds transfer in 14 bulk. They were just one big number that 15 came in from Visa, one number that came in 16 from MasterCard, and then we'd sort it out 17 according to our own accounting records. 18 Maybe I don't understand the question.</p> <p>19 Q. Was there a particular event that would 20 trigger an electronic forwarding of money 21 from FNBL to a merchant or to a third 22 party?</p> <p>23 A. Our instruction.</p> <p>24 Q. And what was a typical instruction?</p> <p>25 A. It would be, at this point in time -- "On</p>
<p style="text-align: right;">Page 147</p> <p>1 ten minutes, and we would accumulate those 2 until it was convenient or until the next 3 time we settled it through the Visa and 4 MasterCard networks. Now, that wasn't 5 necessarily accumulating it until a 6 pre-determined amount was reached. It was 7 accumulating it until either we wanted to 8 get them in under the day's fiscal cutoff or 9 for the next time we -- our next cycle we 10 had to settle through Visa and MasterCard. 11 We probably had three or four times a day, 12 we did that.</p> <p>13 Q. Okay.</p> <p>14 A. Now, as far as accumulating payments until a 15 pre-determined amount is reached, we really 16 didn't do that, as far as I can tell.</p> <p>17 Q. Looking at Row 9 on Page 10, you just 18 described that Little & Company would often 19 instruct FNBL to forward the payments -- or 20 to settle the payments and forward the 21 payments daily; is that correct?</p> <p>22 A. What we did is we settled the payments -- 23 when I said go to the Visa/MasterCard 24 networks, that, in those days I think was 25 through FNBL. They were operating as our</p>	<p style="text-align: right;">Page 149</p> <p>1 this day, transfer this amount to that 2 account, this account to that account," and 3 it was just a list of amounts and accounts 4 that we would transfer.</p> <p>5 Q. Would it forward -- would it transfer those 6 amounts daily, for example?</p> <p>7 A. Yes. That cycle was done every day.</p> <p>8 Q. Okay. Looking at Line 9 on Page 10, the 9 quote that begins "In consideration of 10 Little & Company making advances," if you 11 look at the second line from the bottom of 12 that quote on Page 11, it says, small Roman 13 Numeral ii, "The daily repayments shall be 14 deducted from daily net proceeds."</p> <p>15 A. Uh-huh.</p> <p>16 Q. Does that show that FNBL would forward 17 payments to the merchant daily and deduct -- 18 well, does that show that FNBL would forward 19 payments, net proceeds, daily to the 20 merchant?</p> <p>21 A. Based on our instruction, we would say 22 "Forward this amount of money, some amount 23 of money, to the merchant." FNBL did not 24 know what the components of that money was. 25 From our point of view, our instructions</p>

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1 would say "Forward the daily net proceeds,
2 less any of the other obligations of the
3 merchant." The other obligations could be
4 for chargebacks that had actually already
5 been withheld by the networks, it could be
6 for our fees, it could be for payment of
7 postage advances, it could be for payment of
8 terminals, it could be to increase increase
9 the reserve account. It could be all kinds
10 of stuff --

11 THE VIDEOGRAPHER: Five minutes
12 left on tape.

13 A. -- but when you say FNBL forwarded an
14 amount, they forwarded what we told them.
15 It was the sum of all those components.

16 Q. Would you instruct FNBL to forward those
17 payments to the third party?

18 A. Yes.

19 Q. Daily?

20 A. Yes.

21 Q. For example --

22 A. It depended. Actually, sometimes we did do
23 it weekly, so we would -- I guess we
24 would -- yeah, most of the time we did it
25 daily. Frankly, we tried to do everything

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1 daily. We tried to deal with interchange
2 daily. We tried to deal with all this stuff
3 daily, because that was easiest for the
4 merchant if everything happened all at the
5 same time. We'd sort out the fact that Visa
6 actually charge dollars us for interchange
7 once a month. There were all kinds of
8 different timing arrangements that were in
9 there, and for a merchant to try and figure
10 that all out, it was difficult, so we tried
11 to do everything daily for the merchant. .

12 Q. But if not daily, was it typically on some
13 other periodic basis?

14 A. Yes.

15 MR. GRAY: We can go ahead and
16 change the tape.

17 THE VIDEOGRAPHER: The time is
18 2:08. This is the end of Cassette 2. We
19 are off the record.

20 MR. SMITH: We'll take five.

21 (Recess.)

22 THE VIDEOGRAPHER: The time is
23 2:17. This is the beginning of Cassette
24 Number 3 in the deposition of Thomas Little.
25 We are on the record.

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1 Q. (Cont'd. By Mr. Gray) Mr. Little, I'd like
2 you to look back at Little Exhibit 11, and
3 again, read Claim 10 to yourself slowly.
4 When the language -- when the claim recites
5 "means" for something, that means it's
6 reciting an apparatus or equipment that is
7 used for performing a particular function,
8 and what I'd like to ask you is, for each of
9 those portions of a claim, and I'll begin
10 with "means for accepting a customer
11 identifier as payment for the customer."
12 I'd like you to tell me whether there was
13 standard equipment used in the industry for
14 performing a particular function. Do you
15 understand?

16 A. I think so.

17 MR. EDELMAN: I object. Also, it
18 calls for claim construction.

19 Q. Was there standard equipment used in the
20 industry for accepting a customer identifier
21 as payment from the customer?

22 MR. EDELMAN: Same objections.

23 A. There were standards. There were several
24 types of equipment. The one we dealt with
25 most was an order processing system that was

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1 basically a terminal and an operator would
2 key in the order. The software that managed
3 that computerized order entry system was
4 often sold to the direct marketers by a
5 third party, and there are limited numbers.
6 Sometimes direct marketers wrote their own
7 software. They used different equipment,
8 but it was all basically what one would
9 consider a relatively standard order entry
10 system.

11 Q. And to clarify, was that a computer keyboard
12 where someone would input a number --

13 A. Yes.

14 Q. -- into a computer?

15 A. Uh-huh. That was one way.

16 Q. What was another way?

17 A. Another way was to actually use terminals
18 and probably five years before the period of
19 time we're talking about, which I think is
20 1992, that range, the computerized order
21 entry systems really didn't accept credit
22 cards, so terminals were used in parallel
23 with the computerized order entry system,
24 but by 1992, it was generally order entry
25 systems that were built to accept credit

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1 cards, to check the validity, the mechanical
 2 validity. The Visa and MasterCard
 3 transactions were 16 characters long and
 4 started with a 4 and a 5 respectively, and
 5 had a 10-check digit at the end, and that
 6 kind of stuff, and that was most of the
 7 card-not-present transactions.
 8 Q. And Litle & Company processed -- did Litle &
 9 Company process card transactions for
 10 merchants who accepted credit cards or cards
 11 via terminals or computer keyboard input?
 12 A. Yes. The terminals was -- we certainly
 13 did. That was a smaller part of our
 14 business.
 15 Q. What sort of hardware did merchants use to
 16 electronically forward information related
 17 to the payment to Litle?
 18 A. They used -- on their computers, they had
 19 connections to either -- in those days, they
 20 had connections to either a frame relay
 21 system, which was something supplied by the
 22 telephone company, or a regular dial-up
 23 telephone, and those transactions would get
 24 conveyed to us via those kinds of
 25 telephone-operated networks.

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1 Q. Okay. How would Litle receive that
 2 information from the merchant?
 3 A. We would also be connected to either a plain
 4 dial-up line, and the merchant would call
 5 the number, our number, basically, make a
 6 telephone call, and we'd have a modem
 7 connected to that and we'd receive the
 8 merchant's data, or we'd be connected to the
 9 other end of a frame relay circuit and
 10 accept the information from the merchant, or
 11 in some cases, we actually had a lease line
 12 between the merchant and us, and so it was
 13 just like a -- the phone company provided
 14 it, but it was like a wire between us and
 15 the merchant.
 16 Q. What hardware was used for authorizing and
 17 settling the payment at each of the entities
 18 involved in the process?
 19 MR. EDELMAN: Objection. Calls for
 20 claim construction.
 21 A. The -- what hardware was --
 22 Q. -- was used by each entity in the process
 23 outlined in Litle Exhibit 10, and I'm just
 24 asking generally.
 25 MR. SMITH: You mean, each of

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1 the --
 2 Q. Right. For example, computers, network and
 3 modem.
 4 A. Well, that's it. It was the way the
 5 transaction was captured, whether it was in
 6 an order entry system or a terminal, the way
 7 it was transmitted, whether it was connected
 8 by modem or to a lease line -- a modem to a
 9 dial-up line. It was actually modems to a
 10 frame relay line or connected to a lease
 11 line at the merchant's end. Basically, the
 12 reverse of that at our end to receive the
 13 information, and the information went back
 14 and forth. When a merchant would send in a
 15 settlement file, for example, then we had to
 16 send back a confirmation that what they
 17 thought they sent us, we actually got, and
 18 that was the moment in time, when we sent
 19 back that confirmation, when we owned the
 20 transactions.
 21 Q. And you testified earlier to this, but what
 22 hardware was used -- sorry. Let me start
 23 over. How was the money forwarded from FNBL
 24 to the third party in your diagram in
 25 Exhibit 10?

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1 A. Either through a wire transfer, which was,
 2 a wire transfer system is operated by the
 3 Fed -- it's the way banks typically transfer
 4 money between each other -- or by the ACH --
 5 an ACH system, which means automated
 6 clearinghouse, and I think that's operated
 7 by the Fed -- no. It's operated by an
 8 organization called NACHA, National
 9 Automated Clearinghouse Association, or
 10 something like that, and which really did
 11 the same thing as a wire did, except it took
 12 a day longer.
 13 Q. In each of the examples that you've
 14 testified to here today, is the equipment
 15 that is used by each of the entities in
 16 Litle Exhibit 10, is that -- is it the same
 17 equipment?
 18 A. Pretty much. Depending on the
 19 circumstance. If it was the same
 20 circumstance, it would be the same type of
 21 equipment. I mean, we would have ten people
 22 transmitting files at the same time, so
 23 there were ten instances in the same
 24 equipment, but --
 25 Q. Okay. In other words, did the equipment

40 (Pages 154 to 157)

<p style="text-align: right;">Page 158</p> <p>1 change between the Hanover finance situation</p> <p>2 and the postage finance situation, for</p> <p>3 example?</p> <p>4 A. It could because it just depended on how</p> <p>5 Hanover would receive payments. Maybe they</p> <p>6 received an ACH. Maybe they received a</p> <p>7 wire. I don't remember how they did that.</p> <p>8 Q. Either way, it was an electronic transfer?</p> <p>9 A. Yes.</p> <p>10 MR. GRAY: I'll pass the witness.</p> <p>11 (Discussion off the record.)</p> <p>12 CROSS-EXAMINATION</p> <p>13 by Mr. Edelman:</p> <p>14 Q. Good afternoon.</p> <p>15 A. Hi.</p> <p>16 Q. I am Mike Edelman. I will be asking you</p> <p>17 questions on behalf of Advanceme. Could you</p> <p>18 put Little Exhibit 11 back in front of you?</p> <p>19 Now, I believe you testified earlier that</p> <p>20 you thought, at least from your perspective,</p> <p>21 that you understood what Claims 1 and 10</p> <p>22 encompassed?</p> <p>23 A. Uh-huh.</p> <p>24 Q. Is that correct?</p> <p>25 A. Not from a lawyer's point of view, but</p>	<p style="text-align: right;">Page 160</p> <p>1 we haven't really gotten to that aspect of</p> <p>2 what we -- what we think our service will</p> <p>3 be. I don't know if we'll ever perform</p> <p>4 that. We may. We may not.</p> <p>5 Q. When you say "that," do you mean providing</p> <p>6 payments to third parties?</p> <p>7 A. Yes.</p> <p>8 Q. Do you have an option that's advertised on</p> <p>9 your website called Dynamic Settlement?</p> <p>10 A. It's not active. Dynamic Settlement, no, we</p> <p>11 don't --</p> <p>12 Q. What is Dynamic Settlement?</p> <p>13 A. Huh?</p> <p>14 Q. What is Dynamic Settlement?</p> <p>15 A. Actually, I don't remember what Dynamic</p> <p>16 Settlement is.</p> <p>17 Q. Doesn't Dynamic Settlement, as described on</p> <p>18 your website, describe payments to third</p> <p>19 parties?</p> <p>20 MR. SMITH: Objection. Same</p> <p>21 instruction. You're here in a personal</p> <p>22 capacity; not as a representative of the new</p> <p>23 Little & Co.</p> <p>24 A. Okay. Providing payments to third parties.</p> <p>25 We do that in the sense that we maintain</p>
<p style="text-align: right;">Page 159</p> <p>1 from --</p> <p>2 Q. From your point of view?</p> <p>3 A. -- from a layman's point of view, yeah.</p> <p>4 Q. All right. Does your company perform the</p> <p>5 inventions in Claims in 1 and 10?</p> <p>6 MR. SMITH: I'm going to object and</p> <p>7 I'm going to instruct the witness not to</p> <p>8 answer to the extent that the answer would</p> <p>9 reveal confidential proprietary information.</p> <p>10 To the extent that it would not it, you may</p> <p>11 answer. He's here in his personal capacity;</p> <p>12 not as a representative of the current Little</p> <p>13 & Company. So with that caveat, the</p> <p>14 question again?</p> <p>15 A. So I'm going to get sued if I say yes;</p> <p>16 right?</p> <p>17 Q. I'm asking --</p> <p>18 A. No, we don't.</p> <p>19 Q. You do not, and why do you not perform the</p> <p>20 inventions in Claims 1 and 10 in your</p> <p>21 current business?</p> <p>22 A. Because our company is a relatively new</p> <p>23 company and the process by which we build</p> <p>24 our system is building it up sequentially to</p> <p>25 serve the needs of our early customers, and</p>	<p style="text-align: right;">Page 161</p> <p>1 reserves, we maintain -- we do some of the</p> <p>2 stuff we're talking about. We don't do</p> <p>3 postage financing.</p> <p>4 Q. Do you believe that maintaining reserves for</p> <p>5 third parties is not performing Claims 1 and</p> <p>6 10?</p> <p>7 MR. SMITH: Objection.</p> <p>8 A. I think that's -- I think that's an</p> <p>9 interpretation of the patent and that's not</p> <p>10 why I'm here.</p> <p>11 Q. You didn't seem to have any problem with the</p> <p>12 other side's questions.</p> <p>13 MR. SMITH: Object to the</p> <p>14 characterizations.</p> <p>15 MR. GRAY: I never asked --</p> <p>16 Q. Mr. Little, is there any way to perform</p> <p>17 Claims 1 and 10, other than postage</p> <p>18 financing?</p> <p>19 MR. SMITH: Objection. You're</p> <p>20 asking about his interpretation again.</p> <p>21 Q. In your layman's perspective.</p> <p>22 A. Is there any way to what?</p> <p>23 Q. Perform Claims 1 and 10, other than by</p> <p>24 postage financing.</p> <p>25 A. Sure.</p>

<p style="text-align: right;">Page 162</p> <p>1 Q. And are there any ways that Claims 1 and 10 2 could be performed through setting up 3 reserve accounts through third parties? 4 MR. SMITH: Objection. 5 A. Is there any way -- repeat the question. 6 (The previous question was read 7 back by the court reporter.) 8 MR. SMITH: Objection, to the 9 extent you're asking him to interpret the 10 claims. 11 A. Setting up reserve accounts through third 12 parties. 13 MR. SMITH: Objection. Vague. 14 A. Could you define for me what you mean by 15 "reserve account through third parties"? I 16 know what a reserve account is. I know what 17 "through third parties" means, but I don't 18 know what a -- 19 Q. Is the process of setting up a reserve 20 account for a third party something that can 21 result in a performance of Claims 1 and 10? 22 MR. SMITH: Objection, to the 23 performance of Claims 1 and 10. 24 A. A reserve account for a third party? 25 Q. Yes.</p>	<p style="text-align: right;">Page 164</p> <p>1 information. 2 A. Okay. The question -- repeat the question, 3 please? 4 MR. EDELMAN: Could you read it 5 back? 6 (The pending question was read back 7 by the court reporter.) 8 MR. SMITH: Do you need to talk 9 about it? 10 THE WITNESS: Yeah, but it's -- you 11 know, it's basically a trick question. 12 MR. SMITH: Well, then if you can't 13 answer the question as phrased, you can't 14 answer the question as phrased. 15 A. Because it isn't a question of what does 16 Dynamic Settlement provide separate from 17 what do we currently provide. It's 18 basically two questions. 19 Q. I'm just asking you what -- does -- okay. 20 I'll try to ask it a different way. . Does 21 Litle & Company currently provide any 22 benefits to third parties as part of the 23 payment processing services? 24 MR. SMITH: I object to the form of 25 the question, but if that's clear to you,</p>
<p style="text-align: right;">Page 163</p> <p>1 THE WITNESS: I don't know what 2 he's talking about. 3 MR. SMITH: Okay. Can you phrase a 4 new question? I think it's a confusing 5 question. He can't answer the question, 6 so -- 7 Q. Let me ask him another one. Under the 8 Dynamic Settlement process that is 9 advertised on your website, what benefits 10 does Litle & Company currently provide to 11 third parties? 12 A. An example -- what do we currently 13 provide -- 14 Q. Yes. 15 MR. SMITH: I'll instruct you not 16 to answer anything that's not publicly 17 available. 18 Q. Can you answer the question? 19 A. Yes. 20 Q. Okay. Go ahead. 21 MR. SMITH: Do you need to talk or 22 do you understand what he's saying? My 23 instruction is to answer the question to the 24 extent that you're not revealing 25 confidential proprietary current Litle & Co.</p>	<p style="text-align: right;">Page 165</p> <p>1 with my previous caveats, please answer. 2 A. Provide third parties, meaning, not the 3 merchant? 4 Q. Right. 5 A. I'm trying to think. Do we provide any 6 benefits to third parties? Yes. 7 Q. Okay, and what benefits are those? 8 A. Well, we work with -- 9 MR. SMITH: Same caveat before you 10 answer. My same instruction. You're not 11 going to reveal any proprietary or 12 confidential information. 13 A. Okay. As a general, we work with a lot of 14 third parties, like third-party fulfillers, 15 people like that. We provide a lot of 16 benefits to fulfillers, including various 17 kind of consulting roles, setting up 18 networks for them, helping them be able to 19 service card-not-present merchants better. 20 I am not currently aware that we pay third 21 parties directly for obligations of 22 merchants. 23 Q. What do you mean by "directly"? 24 A. That we forward obligations of merchants, 25 like what they owe to a fulfillment</p>

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1 company -- I am not aware that we forward
 2 those kinds of payments to fulfillment
 3 companies today. We may, but I don't --
 4 Q. Is there any company, other than Litle &
 5 Company, that might forward such payments on
 6 Litle's behalf?
 7 MR. SMITH: Same caveat. Same
 8 instruction applies.
 9 A. Yeah. I don't -- I don't think so.
 10 Q. Is providing the benefits to fulfillment
 11 companies what is meant on the website by
 12 the term "Dynamic Settlement"?
 13 MR. SMITH: I'm going to instruct
 14 you not to answer that question. He is here
 15 in his personal capacity. If you want to
 16 subpoena Litle & Co., by all means, but he's
 17 not going to --
 18 MR. EDELMAN: He is the founder of
 19 Litle & Company. He can answer the
 20 question.
 21 MR. SMITH: Well, I'm instructing
 22 him not to answer the question.
 23 MR. EDELMAN: On what basis?
 24 MR. SMITH: On the basis that he's
 25 here in his personal capacity. He's here to

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1 testify about stuff that happened years ago,
 2 and you're asking him about stuff with his
 3 current company. He's not prepared to
 4 testify. He's not going to testify on Litle
 5 & Co.'s behalf today. If you want to
 6 subpoena the company, do so.
 7 MR. EDELMAN: You know that's not a
 8 relevant objection -- a valid objection.
 9 MR. SMITH: I disagree.
 10 MR. EDELMAN: You know and I know
 11 that.
 12 MR. SMITH: I disagree.
 13 MR. EDELMAN: There's no objection
 14 in the Federal Rules of Evidence --
 15 MR. SMITH: Certainly, there are.
 16 He's not going to reveal confidential
 17 information. He's a third party to this
 18 lawsuit and he's not going to do it.
 19 Q. Is the process or the details of the process
 20 by which you work with third-party
 21 fulfillers confidential or proprietary to
 22 Litle?
 23 MR. SMITH: Objection, to the
 24 extent that calls for a legal conclusion.
 25 If you want to talk about what confidential

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1 and proprietary means -- if you want to talk
 2 about what confidential and proprietary
 3 means, we can do that off the record.
 4 A. We have non-disclosure agreements with
 5 virtually every fulfillment company we work
 6 with.
 7 Q. So would it be permitted pursuant to those
 8 non-disclosure agreements for you to
 9 publicly talk about the details of how you
 10 process payments with those third-party
 11 fulfillment companies?
 12 MR. SMITH: Objection. Calls for a
 13 legal conclusion. I don't think you should
 14 answer that. If you understand his
 15 question, go ahead, but I instruct you not
 16 to answer.
 17 A. I'll try and answer the question for you,
 18 with the expectation that this makes sense
 19 and we can move on. Dynamic Settlement on
 20 our website does -- is something that a
 21 marketing guy in our company put up on the
 22 website that theoretically means that we
 23 will do third-party payments. We have not
 24 to this date done third-party payments, as
 25 we've been describing that the old Litle &

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1 Company did, because we haven't -- we don't
 2 have the accounting capacity to deal with
 3 it.
 4 Q. Your website states that Litle & Company
 5 offers Dynamic Settlement; correct, and
 6 you're telling me now that, in fact, the
 7 company can't provide the services it
 8 advertises?
 9 MR. SMITH: Objection. Compound
 10 question. Object to the form. Object to the
 11 extent that he's here in his personal
 12 capacity --
 13 A. We --
 14 MR. SMITH: I would say don't
 15 answer that question.
 16 A. Okay.
 17 MR. SMITH: Are you instructing him
 18 not to answer?
 19 MR. SMITH: I do. Rephrase it. I
 20 object to the question.
 21 Q. Okay. You just referred to the fact that
 22 there was non-disclosure agreements in place
 23 with fulfillment companies. Do I have that
 24 right?
 25 A. That's true.

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<p style="text-align: right;">Page 170</p> <p>1 Q. What sort of information is protected by 2 those non-disclosure agreements? 3 MR. SMITH: Objection. It calls 4 for legal conclusions. He's not here to 5 testify to that. 6 MR. EDELMAN: He's here to testify 7 in his individual capacity and whatever I 8 ask him. That's the rules. You can't 9 instruct him not to answer my questions. 10 MR. SMITH: Don't state the rules 11 to me. I can instruct him to do whatever I 12 want, so -- 13 MR. EDELMAN: And I can haul you to 14 the Eastern District of Texas and get 15 sanctions for both him, personally, and 16 you. 17 MR. SMITH: If you want to try to 18 get me to Texas, good luck. 19 MR. EDELMAN: Okay. I will get you 20 to Texas because you cannot instruct him not 21 to answer that question. 22 MR. SMITH: Good luck, but the 23 subpoena is issued out of the District of 24 Massachusetts. Let's not forget that. Now, 25 look, he can't testify to the contents of</p>	<p style="text-align: right;">Page 172</p> <p>1 either the fulfillment company or that we 2 would not want discussed publicly or that 3 isn't already in the public domain. 4 Q. And do you consider the manner by which you 5 provide services or benefits to a 6 fulfillment company to be the type of 7 information that is not public? 8 A. Generally, no, but sometimes, yes. There 9 are often protocols and there are often 10 methods of operation that a third-party 11 fulfillment company considers proprietary. 12 There's often special ways to hook up 13 networks. There's often things that they do 14 that, from their point of view -- they are 15 proprietary skills that even their customers 16 don't know. It helps them do their job 17 better. Under those circumstances, no, we 18 don't reveal it to their competitors. Just 19 like when we have a lot of merchants and a 20 lot of merchants compete with each other. 21 We don't tell a competing merchant what the 22 other guy's financial situation is. We -- 23 there's stuff that is obviously proprietary 24 that we don't tell competitors or we don't 25 give to the general public.</p>
<p style="text-align: right;">Page 171</p> <p>1 these agreements and the legal basis for 2 that. 3 MR. EDELMAN: Why not? 4 MR. SMITH: Because he's not a 5 lawyer. He's a fact witness. Ask him stuff 6 about the facts. 7 MR. EDELMAN: So if he can't 8 answer -- I'm not asking him a legal 9 question. My question is -- 10 MR. GRAY: I'll object to 11 relevance, too. 12 MR. EDELMAN: Thank you. 13 Q. My question was: What sort of information 14 was -- is protected under your third-party 15 non-disclosure agreements? 16 MR. SMITH: As a general matter. 17 Q. Yes. What sort of information do these 18 agreements protect? 19 MR. GRAY: Objection. Relevance. 20 MR. SMITH: I'm going to also 21 object to relevance. I'll say that, if you 22 understand his question, to the extent you 23 know in your capacity as a lay witness, you 24 can answer. 25 A. It would be information that the -- that</p>	<p style="text-align: right;">Page 173</p> <p>1 Now, we have some of those things 2 ourselves. Some of the ways we do our 3 processing, some of the techniques we use to 4 make sure we don't process duplicate files, 5 for example. There's a whole lot of stuff 6 like that, that, as far as I'm concerned, 7 are proprietary. 8 Now, I'll go back to your question 9 about Dynamic Settlement because you 10 probably don't understand why I'm having 11 trouble with this. Dynamic Settlement is 12 basically a term that a marketing guy in our 13 place came up with with third-party 14 payments. Yes, it is advertised on the 15 website. One of the unique characteristics 16 about our company is we can turn on a dime. 17 If we find somebody that really wants to 18 have Dynamic Settlement, and we elect to 19 offer Dynamic Settlement, by the time we get 20 the contract signed, we'll be able to offer 21 Dynamic Settlement, and so -- so whether or 22 not we can -- whether or not we can perform 23 a certain service today doesn't necessarily 24 preclude us from selling it because, by the 25 time we get the contracts and the customer</p>

<p style="text-align: right;">Page 174</p> <p>1 all in place, we'll have it available. 2 We're really good at that. That's one of 3 the reasons we won the CIO 100 Award, is 4 because we are one of the best IT 5 departments in the country, according to 6 them. 7 MR. SMITH: Wait for another 8 question. 9 Q. Okay. So let's go back to the old Litle & 10 Company for a moment. All right? When the 11 old Litle & Company dealt with fulfillment 12 companies, did it also have non-disclosure 13 agreements with the companies during that 14 time period? 15 A. I wouldn't be at all surprised if they did. 16 I don't remember, specifically. 17 Q. Would you have any reason, as you sit here, 18 to believe that there wouldn't be 19 non-disclosure agreements in the old Litle & 20 Company? 21 A. No. 22 Q. And were the type of things that those 23 agreements protected similar to the type of 24 things that would be protected under the 25 non-disclosure agreements that the new</p>	<p style="text-align: right;">Page 176</p> <p>1 Q. Yeah. 2 A. I wouldn't be surprised, but it wasn't 3 necessarily something we did all the time 4 because, very often, we didn't tell our 5 merchants what we were doing when we were 6 processing -- 7 Q. Okay. 8 A. -- but to the extent that we had to and we 9 felt it was proprietary, we would have 10 protected it by a non-disclosure. 11 Q. In -- now, again, I'm going to refer back to 12 the old Litle & Company. Okay? When 13 Litle & Company signed up merchants or 14 customers for its business, was it typical 15 that there would be a merchant agreement 16 signed? 17 A. It was typical then. It's mandatory now. 18 Q. Okay, and in those merchant agreements, was 19 it typical for a confidentiality clause to 20 be included? 21 A. Yes, but the confidentiality clause dealt 22 with proprietary data, primarily. That was 23 the standard piece of the agreement, is 24 because we would see customer lists, 25 et cetera, from our merchants and we were</p>
<p style="text-align: right;">Page 175</p> <p>1 Litle & Company has? 2 A. Oh, come on. 3 MR. SMITH: Objection. 4 Irrelevant. Lack of foundation. Outside of 5 the scope of this witness's knowledge. 6 MR. EDELMAN: Are you instructing 7 him not the answer? 8 MR. SMITH: No. Your answer was 9 "Oh, come on." 10 A. In a deposition, you're not supposed to 11 speculate. 12 Q. Okay. Can you identify, as you sit here, 13 any difference between the type of 14 information that would be protected under 15 the old Litle & Company non-disclosure 16 agreements and the type of information that 17 would be protected under the new 18 non-disclosure agreements? 19 MR. SMITH: Objection. 20 A. No. 21 Q. So sometimes the old Litle & Company would 22 enter into non-disclosure agreements that 23 would encompass certain ways that Litle & 24 Company would perform its processing. 25 A. Is that a question?</p>	<p style="text-align: right;">Page 177</p> <p>1 not to disclose that or misuse that data. 2 Q. If you could turn to Exhibit Litle 4, and I 3 want to direct your attention to the 4 document Bate-stamped LI00021. 5 MR. SMITH: What's the number? 6 Q. It's Page 21. 7 A. Yeah. 8 Q. Okay, and do you see Section 17 of this 9 agreement has a confidentiality provision? 10 A. Yeah. 11 Q. Okay, and it goes on to the next page? 12 A. Yeah. 13 Q. Okay. Is this a portion of the Member 14 Agreement that you drafted yourself? 15 A. Yes. 16 Q. Okay. Was this language about 17 confidentiality typical of the type of 18 confidentiality language you would put in 19 your member agreements? 20 A. Yes, and it's completely different from 21 the kind of confidentiality agreement you 22 were talking -- confidentiality information 23 you were talking about a while ago. 24 Q. Earlier in your testimony, you made a 25 reference to the old Litle & Company</p>

<p style="text-align: right;">Page 178</p> <p>1 purchasing transactions. Do you recall 2 that? 3 A. That's true. 4 Q. What do you mean by "purchasing 5 transactions"? 6 A. Well, I can explain it or you can read it in 7 the same Exhibit 4, because it's a defined 8 term. 9 Q. Okay. Are you referring to the definition 10 of "purchased"? 11 A. Yeah. 12 Q. Okay. 13 MR. SMITH: Do you want to explain 14 it or do you want him to read that in the 15 record? 16 Q. Why don't you go ahead and explain to me 17 what you mean by "purchased." 18 A. When we receive settlement transactions from 19 the merchant and we confirm that we received 20 the settlement transactions, the number and 21 the dollar amounts of it, at that point, 22 that's the point where we actually purchase 23 the transaction from the merchant and we 24 purchase the transactions for their face 25 value, less the discount and various kinds</p>	<p style="text-align: right;">Page 180</p> <p>1 or ACH to them on Wednesday. If it's wired, 2 they get the money on Wednesday. If it's 3 ACH'd to them, they get the money on 4 Thursday. 5 Q. All right, and pursuant to this standard 6 Member Agreement, Litle & Company was 7 acquired to be the sole company that 8 processed the credit card transactions for 9 those companies involved in the postage 10 financing program; correct? 11 A. That's right. 12 Q. So with respect to those companies involved 13 in the postage financing program, is it fair 14 to say take Litle & Company was the only 15 company that purchased or processed the 16 credit card transactions? 17 A. By agreement, that was supposed to happen. 18 Sometimes merchants didn't do what they were 19 supposed to do. 20 Q. Can you identify any instance in the postage 21 financing program where a merchant didn't do 22 what they were supposed to do? 23 A. No. 24 Q. Okay, and in the payment process that you 25 described earlier, you indicated that</p>
<p style="text-align: right;">Page 179</p> <p>1 of fees. 2 Q. Is there any other party involved in the 3 normal payment processing cycle that you 4 described earlier that would acquire member 5 transactions, other than Litle & Company? 6 MR. SMITH: Objection. Acquire or 7 purchase? I'm sorry. 8 Q. Start with purchase. 9 A. The party that purchases the transaction is 10 the party that has the agreement with the 11 merchant, and no, there aren't other parties 12 that are involved with the actual purchase 13 of the transaction. 14 Q. Okay. When would you, during a typical 15 processing transaction, pay the merchant for 16 this purchase of the transaction? 17 MR. SMITH: Objection. 18 A. I assume you mean, pay the merchant for the 19 net -- basically, the net proceeds -- 20 Q. Yes. 21 A. -- as may be adjusted by other means. 22 Q. Fine. 23 A. That's generally a negotiated item, but if 24 we purchase transactions on Monday, it's 25 typically, they have the money wired to them</p>	<p style="text-align: right;">Page 181</p> <p>1 Litle & Company would provide instructions 2 on what should happen with funds; correct? 3 MR. SMITH: Objection. Vague. Can 4 you restate the question? I'm sorry. 5 Q. Well, I'm just trying to restate what you 6 said earlier about the instructions that 7 Litle provided, that in the normal payment 8 processing service that you provided, 9 Litle & Company was the company that 10 provided instructions to a bank -- 11 A. Oh, you're talking about the instructions to 12 First of Louisville? 13 Q. Yes. 14 A. Okay. Now, what was the question? 15 Q. The question was: Litle & Company was the 16 company that provided instructions to the 17 bank? 18 A. That's true. 19 Q. It was the bank that actually then forwarded 20 the actual payments? 21 A. They executed the instructions, yes. 22 Q. Okay. Did Litle & Company forward the 23 payments itself or did the bank forward the 24 payments? 25 A. Originally, when we started, Litle & Company</p>

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1 forwarded the payments because we held the
 2 bank accounts. There were other payment
 3 processors, third-party payment processors,
 4 around that, instead of forwarding the money
 5 the way they were supposed to, they
 6 basically used the money for working
 7 capital, kept the money, and the merchants
 8 didn't get their money, and Visa had to step
 9 up and pay for that. They changed the rules
 10 to limit their liability and make sure there
 11 was an acquiring bank to watch over the
 12 third-party payment processors and be
 13 responsible for any lack of performance by
 14 the third-party payment processors. That --
 15 under those circumstances -- under those
 16 circumstances, it currently is Visa
 17 regulations where third-party payment
 18 processors cannot actually execute the
 19 forwarding of the money to the bank.
 20 Q. Well, in a standard Member Agreement that is
 21 marked as Litle 4, it would be the bank that
 22 would actually forward the payment;
 23 correct?
 24 A. I believe that that change in Visa
 25 regulations and requirements was in place at

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1 that time, yes.
 2 Q. Do you know when those regulations came into
 3 place?
 4 A. Yeah. It was right around that time, in the
 5 early nineties, and whenever Visa proclaims
 6 a new regulation, it usually takes several
 7 years to get everybody to comply. So some
 8 of our contracts would have complied. Some
 9 of them wouldn't have.
 10 Q. Do you know, for the Exposures Member
 11 Agreement, whether that agreement was
 12 similar in its content to the Museum
 13 Agreement?
 14 A. It would have been similar. The method of
 15 who transferred the money may have been
 16 different then. I just don't -- do we have
 17 an Exposures agreement? I could tell by
 18 looking at the Agreement.
 19 Q. Did you conduct any search to try to find
 20 the Exposures agreement in response to the
 21 subpoena served by Advanceme?
 22 MR. SMITH: Well, he conducted a
 23 search in response to the subpoena. I don't
 24 think there was a specific request for
 25 Exposures.

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1 MR. EDELMAN: There was.
 2 A. You'll of to remember that all that
 3 documentation is held at Paymentech, the
 4 company, my old company, a company with whom
 5 I compete, and they're not going to make
 6 their records easily available to me. On
 7 the other hand, they did --
 8 MR. SMITH: Just answer his
 9 question. His question was: Did you
 10 conduct a search?
 11 A. Yeah, I did.
 12 Q. Did you work with Paymentech to conduct a
 13 search for documentation relating to
 14 Exposures?
 15 MR. SMITH: Objection. "To work
 16 with."
 17 A. I was going to ask, what do you mean
 18 by "work with"?
 19 Q. Did you communicate with Paymentech?
 20 A. I communicated with Paymentech.
 21 Q. And what did you say to Paymentech?
 22 A. I delivered a voicemail saying we're
 23 interested in -- or I had been asked to
 24 provide documentation and I'd be interested,
 25 and "Do you have any of that documentation

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1 available?"
 2 Q. What documentation did you specify?
 3 A. It was anything that had anything to do with
 4 postage financing.
 5 Q. Okay. Did you communicate to Paymentech
 6 that you were looking for information
 7 specifically pertaining to Exposures?
 8 A. I don't remember.
 9 Q. When did you --
 10 A. I might have.
 11 Q. I'm sorry.
 12 A. I probably did because I remembered that
 13 Exposures was one of the companies.
 14 Q. And who did you forward the request to at
 15 Paymentech?
 16 A. Mike Duffy.
 17 Q. Did Mr. Duffy work with you at the old Litle
 18 & Company?
 19 A. Yes. I hired him.
 20 Q. What was his position?
 21 A. Vice-president of finance and
 22 administration.
 23 Q. And when Litle & Company was sold, did Mr.
 24 Duffy stay on at Paymentech?
 25 A. Yes, he did.

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1 Q. Okay. What is his position now at
2 Paymentech?
3 A. He is everything, except vice-president of
4 finance and administration. He runs the
5 place.
6 Q. Did you actually talk to him personally
7 about the request for information?
8 A. No. I left a voicemail.
9 Q. And Mr. Duffy then provided information to
10 you in response to your request?
11 A. Either he did or one of the people that
12 worked for him did.
13 Q. Okay.
14 A. But I don't think they provided it to me. I
15 think they provided it to --
16 Q. Did anyone assist you in attempting to
17 gather information from Paymentech?
18 MS. PRESTON: In response to your
19 subpoena?
20 MR. EDELMAN: Yes.
21 MR. SMITH: To the extent you were
22 assisted by counsel or anyone working at the
23 behest of counsel, I would instruct you not
24 to answer, but otherwise --
25 A. The answer is no.

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1 Q. Did you have any discussion with Mr. Goldin
2 about obtaining information from Paymentech?
3 MS. PRESTON: In response to the
4 subpoena?
5 MR. SMITH: Can you identify who
6 you're talking about?
7 Q. David Goldin.
8 A. Yes.
9 Q. I hope we all know who he is.
10 A. Yes.
11 Q. And what discussion did you have with Mr.
12 Goldin on that subject?
13 A. Well, I got this call from somebody I never
14 heard of and he said "I'm in a patent
15 litigation and I heard that you knew
16 something about third-party payments from
17 payment processors. What can you tell me
18 about it? I hear you did some of that."
19 That's about the -- about the way the
20 conversation went, and I said "Yeah, we did
21 that. We did postage financing and we did
22 some other stuff," and he said "Do you have
23 any documentation about that?" As a result
24 of that question, I left a voicemail for
25 Mike Duffy.

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1 Q. Now, when was this initial communication?
2 A. Geez, I don't remember. Two months ago.
3 Maybe more. I don't know.
4 Q. So the initial communication came from Mr.
5 Goldin to you?
6 A. Yes.
7 Q. And at the time that that communication
8 occurred, were you already aware of
9 Advanceme?
10 A. No, never heard of them.
11 Q. Okay. Now, I'm going to go back to the time
12 period of the old Litle & Company and again
13 focus on the 1986 to 1995 time period.
14 During that time period, did Litle & Company
15 regularly advertise in magazines or
16 periodicals?
17 A. Uh-huh.
18 Q. What were the names of the magazines or
19 periodicals it would advertise in?
20 A. They were typically the trade press for the
21 direct marketing industry. DM News, Direct
22 Catalog Age. There may have been one or two
23 others.
24 Q. Okay, and why did Litle & Company want to
25 advertise in those sort of magazines?

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1 A. To just keep our name in front of people.
2 Q. Was one of the purposes of those
3 advertisements to tell potential customers
4 of the type of services that Litle & Company
5 could offer?
6 A. Yeah, to some degree, but most people knew
7 what we did.
8 Q. Okay. How much money, on a yearly basis,
9 would Litle & Company spend to place these
10 advertisements?
11 A. A hundred thousand dollars.
12 Q. I'm sorry. A hundred thousand? Was there
13 somebody at Litle & Company that was in
14 charge of advertising?
15 A. For short periods of time. They didn't last
16 long.
17 Q. Who was that person?
18 A. Huh?
19 Q. Who was that person?
20 MR. SMITH: Objection. I think it
21 was people.
22 Q. Oh, more than one person. Can you name any
23 individuals?
24 A. No.
25 Q. But there were periods of time when you were

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<p style="text-align: right;">Page 190</p> <p>1 personally in charge of advertising for the</p> <p>2 company?</p> <p>3 A. When I personally was in charge?</p> <p>4 Q. Yes.</p> <p>5 A. Well, there was a period of time when I was</p> <p>6 personally in charge of everything.</p> <p>7 Q. So you would often make personal decisions</p> <p>8 on what advertisements would be placed and</p> <p>9 how often they would be placed and that sort</p> <p>10 of thing?</p> <p>11 MR. SMITH: Objection.</p> <p>12 A. Not really.</p> <p>13 Q. Who would make those decisions?</p> <p>14 A. Whoever our marketing person du jour was.</p> <p>15 Q. Okay, and did Litle & Company continuously</p> <p>16 place advertisements from the 1986 to 1995</p> <p>17 period?</p> <p>18 MR. SMITH: Objection.</p> <p>19 Continuously?</p> <p>20 A. "Continuously" sounds like some sort of</p> <p>21 program, and that wasn't the case.</p> <p>22 Q. But was there a time when it ceased</p> <p>23 advertising all together? Was there a time</p> <p>24 when Litle & Company just stopped placing</p> <p>25 ads all together, decided that it wasn't a</p>	<p style="text-align: right;">Page 192</p> <p>1 Q. Okay. How much would Litle & Company spend</p> <p>2 on a yearly basis in creating marketing</p> <p>3 materials to hand out?</p> <p>4 A. Fifty thousand dollars. It wasn't much.</p> <p>5 Q. Okay. What aspects of Litle & Company's</p> <p>6 business were discussed in these marketing</p> <p>7 materials that were handed out?</p> <p>8 MR. SMITH: Objection. To the</p> <p>9 extent that you remember. It's a broad</p> <p>10 question.</p> <p>11 A. I do. The fact that we were a payment</p> <p>12 processor that understood the direct</p> <p>13 marketing business and we had lots of good</p> <p>14 references, and "Call us."</p> <p>15 Q. Were there any marketing materials that got</p> <p>16 into some more detail about the type of</p> <p>17 services that Litle & Company could perform?</p> <p>18 A. I'm sure there were. You're asking me to go</p> <p>19 back 20 -- you know, years.</p> <p>20 MR. EDELMAN: Let me mark as next</p> <p>21 in order Exhibit Number 12 -- excuse me.</p> <p>22 What number?</p> <p>23 MS. PRESTON: 13.</p> <p>24 MR. EDELMAN: -- a document that</p> <p>25 has a title "Litle Payment Processing</p>
<p style="text-align: right;">Page 191</p> <p>1 good thing for Litle & Company to do?</p> <p>2 MR. SMITH: In the time period</p> <p>3 you're talking about?</p> <p>4 MR. EDELMAN: Yeah.</p> <p>5 A. Not that I remember.</p> <p>6 Q. Did any of the advertisements that Litle &</p> <p>7 Company placed from 1986 to 1995 make any</p> <p>8 mention of postage financing?</p> <p>9 A. I doubt it, because that wasn't the kind of</p> <p>10 advertising we did.</p> <p>11 Q. Okay. Did any of the advertisements that</p> <p>12 Litle & Company placed from 1986 to 1995</p> <p>13 make any mention of Exposures or Museum</p> <p>14 Publications of America?</p> <p>15 A. I doubt it. That's not the kind of</p> <p>16 advertising we did.</p> <p>17 Q. Now, in addition to advertisements, did</p> <p>18 Litle & Company also create brochures or</p> <p>19 other sorts of marketing material for</p> <p>20 handing out to customers or potential</p> <p>21 customers?</p> <p>22 A. Yeah.</p> <p>23 Q. Okay, and did Litle & Company often hand out</p> <p>24 those sort of materials at trade shows?</p> <p>25 A. Yeah.</p>	<p style="text-align: right;">Page 193</p> <p>1 Services."</p> <p>2 (Document entitled "Litle, Payment</p> <p>3 Processing Services" is marked</p> <p>4 Exhibit Number 13 for</p> <p>5 Identification.)</p> <p>6 Q. Was the document marked as Exhibit 13 one of</p> <p>7 the pieces of marked --</p> <p>8 A. Do I get the --</p> <p>9 MR. SMITH: We don't have a copy</p> <p>10 yet.</p> <p>11 A. -- advantage of being able to look at it?</p> <p>12 Q. You're so greedy.</p> <p>13 MR. SMITH: Do you want him to look</p> <p>14 it over?</p> <p>15 MR. EDELMAN: Yeah, sure.</p> <p>16 A. Yeah, I haven't seen this for ten years.</p> <p>17 MR. SMITH: All set?</p> <p>18 A. I guess so, sure.</p> <p>19 Q. Was the document marked as Exhibit 13 one of</p> <p>20 the pieces of marketing material that</p> <p>21 Litle & Company created?</p> <p>22 A. It appears to be. I don't know when.</p> <p>23 Q. Okay. Do you have a recollection of this</p> <p>24 particular piece of marketing material?</p> <p>25 A. Not specifically. In general, yes.</p>

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1 Q. Does this marketing material marked as
2 Exhibit 13 make any mention of postage
3 financing?
4 A. I didn't see it. I assume that it doesn't.
5 MR. SMITH: Objection.
6 A. That it does not.
7 Q. Does the document marked as Exhibit 13 make
8 any mention of Litle & Company's ability to
9 provide payments to third parties to help
10 pay off obligations the merchants have?
11 A. I didn't see it.
12 Q. Okay. Are you aware of any marketing
13 material that Litle & Company ever created
14 from 1986 to 1995 that made any mention of
15 postage financing?
16 A. Am I aware of it? No.
17 Q. Are you aware of any marketing material that
18 Litle & Company created at any point from
19 1986 to 1995 that made any mention of
20 Exposures or Museum Publications of
21 America?
22 A. I'm not aware of any that was. I'm not
23 aware of whether it was or not. I just
24 can't answer that question.
25 Q. Okay. Now, during this time period from

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1 1986 to 1995, were there any newspaper
2 articles that would be written about the
3 Litle & Company business?
4 A. Yes.
5 Q. Okay. Do you recall approximately how many
6 different newspaper articles?
7 A. A hundred. Lots.
8 Q. Were there any newspaper articles written
9 about a Litle business that made any mention
10 about the postage financing program, other
11 than the Forbes article that was discussed
12 today?
13 A. There could have been.
14 Q. Do you recall any others?
15 A. No.
16 Q. Did you give any interviews to any reporters
17 before any of those articles were
18 published?
19 MR. SMITH: Objection. Which
20 articles?
21 Q. Well, you talked about that there was maybe
22 about a hundred or so newspaper articles?
23 A. Uh-huh.
24 Q. Did any of those articles contain any
25 interviews that a reporter had with you?

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1 A. Probably.
2 Q. Do you recall any newspaper article that
3 talked about any interview with you in which
4 postage financing was discussed?
5 A. Do I recall? No. Is it likely that there
6 was? Probably.
7 Q. You are unable to identify any; correct?
8 A. No.
9 Q. Did you author any articles from 1986 to
10 1995?
11 A. Yes.
12 Q. How many?
13 A. Dozens.
14 Q. Did any articles that you authored from 1986
15 to 1995 make any mention of postage
16 financing?
17 A. Not that I remember, but it's certainly
18 probable.
19 Q. You cannot remember a specific article?
20 A. No. I can't remember any of the articles
21 you're talking about now.
22 Q. Okay. That's not my problem. That's
23 theirs. Did you ever author any articles,
24 from 1986 to 1995, that made any mention of
25 Exposures or Museum Publications of

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1 America?
2 A. Specifically, I doubt it.
3 Q. Why do you doubt it?
4 A. Because we don't talk about our customers
5 like that.
6 Q. Why not?
7 A. That's just a policy. We didn't -- we
8 didn't talk about our customers, unless we
9 were part of something that they were
10 talking about.
11 Q. Are you aware of any newspaper articles,
12 from 1986 to 1995, that made any mention of
13 Litle & Company paying off an obligation
14 that a merchant owed to a third party?
15 A. No. That's not the kind of thing that our
16 articles were about.
17 Q. Now, you stated that, at the time you sold
18 Litle & Company, you thought you had about a
19 thousand different Member Agreements?
20 A. Yeah.
21 Q. Okay. What happened to those agreements
22 when you sold the company? Did they stay in
23 the possession of Paymentech?
24 A. Yes.
25 Q. Was it Litle & Company's practice to

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<p style="text-align: right;">Page 198</p> <p>1 maintain copies of the Member Agreements</p> <p>2 during the time that the relationship with</p> <p>3 the merchant continued?</p> <p>4 A. Yes.</p> <p>5 MR. GRAY: I'm sorry. Did you ask</p> <p>6 whether it was Paymentech's regular</p> <p>7 practice?</p> <p>8 MR. EDELMAN: No. Whether it was</p> <p>9 Little & Company's.</p> <p>10 Q. Did Little & Company create any sort of</p> <p>11 internal newsletter or bulletin to</p> <p>12 distribute to its employees?</p> <p>13 A. I believe so.</p> <p>14 Q. And what was the purpose of distributing an</p> <p>15 internal bulletin and newsletter?</p> <p>16 A. I'm not sure I can answer that, other than</p> <p>17 to say it's a typical thing to employees.</p> <p>18 Talking about employee benefits, how the</p> <p>19 company was doing, et cetera.</p> <p>20 Q. Did those internal bulletins ever talk</p> <p>21 about new programs that Little & Company</p> <p>22 would offer?</p> <p>23 A. I stayed as far away from that kind of stuff</p> <p>24 as possible.</p> <p>25 Q. Who was the person?</p>	<p style="text-align: right;">Page 200</p> <p>1 Q. Okay, and what documents were those?</p> <p>2 MR. SMITH: I'll state that any</p> <p>3 documents that were located relating to</p> <p>4 postage financing were produced in response</p> <p>5 to the subpoena.</p> <p>6 Q. I'm trying to figure out where they were</p> <p>7 located.</p> <p>8 MR. SMITH: I guess that's not the</p> <p>9 question. So if you want to ask a different</p> <p>10 question, that's fine.</p> <p>11 Q. Did you locate documents relating to postage</p> <p>12 financing in response to this subpoena?</p> <p>13 MR. SMITH: He already answered</p> <p>14 that, that he did.</p> <p>15 Q. Okay, and where did you find them?</p> <p>16 MR. SMITH: And I'll state that we</p> <p>17 produced all those documents.</p> <p>18 MR. EDELMAN: I'm asking him a</p> <p>19 question, where he found them.</p> <p>20 A. It wasn't "them." It was one document.</p> <p>21 Q. Okay. Which document was that?</p> <p>22 MR. SMITH: And that's my</p> <p>23 statement. If he doesn't remember the</p> <p>24 document, fine. We produced it to you. I'm</p> <p>25 not trying to be obstructive. If he doesn't</p>
<p style="text-align: right;">Page 199</p> <p>1 A. Somebody in our HR department.</p> <p>2 Q. Okay. Can you identify a name?</p> <p>3 A. No.</p> <p>4 Q. Are you aware of any internal bulletins or</p> <p>5 newsletters that made any mention, from 1986</p> <p>6 to 1995, of postage financing, Exposures --</p> <p>7 A. No.</p> <p>8 Q. -- or Museum Publications of America? No?</p> <p>9 You conducted a search in response to the</p> <p>10 Advanceme subpoena for documents relating to</p> <p>11 postage financing; correct?</p> <p>12 A. Relating to?</p> <p>13 Q. To postage financing.</p> <p>14 A. Yes.</p> <p>15 Q. And where did you search, other than asking</p> <p>16 for information from Paymentech?</p> <p>17 A. I only had one other place, other than</p> <p>18 asking for Paymentech, and that is, we have</p> <p>19 a barn and we have a lot of old documents in</p> <p>20 it, and so searched -- I didn't do that</p> <p>21 initially. I did that fairly recently.</p> <p>22 Q. Okay. Did you locate in your search any</p> <p>23 documents in your possession relating to</p> <p>24 postage financing?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 201</p> <p>1 remember what he turned over to me, you</p> <p>2 know, you were given -- we didn't hold</p> <p>3 anything back.</p> <p>4 MR. EDELMAN: I'm not accusing</p> <p>5 anybody of anything. I'm just trying to</p> <p>6 figure out where he found the documents.</p> <p>7 A. I did find one document in the barn. My</p> <p>8 assistant and I did an exhaustive search.</p> <p>9 It was in a pile of unrelated stuff. I</p> <p>10 don't know how the hell it got there, and</p> <p>11 I -- but there is one document, and I think</p> <p>12 it's been labeled.</p> <p>13 Q. Could you identify that document?</p> <p>14 A. It was Exhibit 8.</p> <p>15 Q. The Interoffice Memorandum. Exhibit 8.</p> <p>16 Okay. At the time that Little & Company was</p> <p>17 sold in 1995, did you maintain any files,</p> <p>18 personally, from Little & Company in your</p> <p>19 possession?</p> <p>20 A. Yes.</p> <p>21 Q. Okay, and what sort of files did you keep?</p> <p>22 A. There were things like the articles and PR</p> <p>23 stuff, just to keep as souvenirs.</p> <p>24 Q. Okay. So the other documents that were</p> <p>25 produced in response to the Advanceme</p>

<p style="text-align: right;">Page 202</p> <p>1 subpoena relating to postage financing were 2 obtained from other sources? 3 MR. SMITH: I'm not sure -- 4 objection. Do you have a specific document 5 in mind? 6 MR. EDELMAN: Let me just mark as 7 next in order -- what are we on? 8 (One-page document is marked 9 Exhibit Number Number 14 for 10 Identification.) 11 Q. I'm just going to hand you a copy of a file 12 folder that we got that has the name 13 "Postage Advance" on it. Could you just 14 review that for a moment and just tell me if 15 this is a copy of a folder or a tab that was 16 in your possession or is it something that 17 was given to you? 18 A. I have not a clue what this is. I don't 19 know where it came from. Maybe it was 20 something that was in the souvenirs by 21 mistake. This stuff was a big mish-mash. 22 MR. SMITH: I'll represent that we 23 produced this document in response to the 24 subpoena. 25 Q. What I'm trying to figure out is where this</p>	<p style="text-align: right;">Page 204</p> <p>1 Q. Okay. Do you know whether or not you have 2 copies of any other Member Agreements? 3 A. No, I don't. I don't remember. 4 Q. Were there any documents that you located in 5 advance to the subpoena that you thought 6 contained confidential information of 7 Litle & Company, and therefore, had concerns 8 about producing? 9 A. The old Litle & Company? 10 Q. Yes. 11 MR. SMITH: I'll object to the term 12 "confidential" as a legal term, but 13 otherwise, you can answer. 14 A. Were there any documents from the old 15 Litle & Company? Yes. 16 Q. Which documents are those? 17 A. It was a list of customers that I should 18 have left there, but somehow, got in the 19 pile of stuff, and it was used to send out 20 notice that Litle & Company had been sold. 21 Q. And you considered that list of customers to 22 be confidential information? 23 A. I recognized I shouldn't have had it, so I 24 figured it was confidential information. 25 Q. Was Exposures and Museum Publications of</p>
<p style="text-align: right;">Page 203</p> <p>1 file called "Postage Advance" was located. 2 MR. SMITH: Well, if you know. 3 A. I have no idea. 4 Q. Okay. You recall not finding any sort of 5 files or areas set aside for Postage 6 Advance-related documentation; correct? 7 A. I recall that there was no such thing. All 8 this stuff was homogenized. You put me 9 through a great deal of effort. We tried to 10 be serious about finding everything and the 11 only thing I remember we found was one 12 document that came from our barn, which 13 you're free to look through -- I would -- 14 MR. SMITH: Okay. 15 A. All the rest of the stuff came from 16 Paymentech. 17 Q. You're giving your attorney a heart attack. 18 You did not locate a copy of the Exposures 19 or Museum Publications Member Agreements; 20 correct? 21 A. I did not. 22 Q. Okay. Did you locate copies of Member 23 Agreements that the old Litle & Company had 24 with other merchants? 25 A. No, I don't remember that I did.</p>	<p style="text-align: right;">Page 205</p> <p>1 America members of Litle & Company at the 2 time the company was sold? 3 MR. SMITH: Objection. To the 4 extent you are using the term "Member" as 5 in "Member Agreement"? 6 MR. EDELMAN: Yes. 7 MR. SMITH: If you know. 8 A. I don't remember if Museum Collections was 9 because it may have either gone out of 10 business or become part of Hanover Direct. 11 I don't remember exactly what happened. 12 Exposures became part of another company and 13 that other company was a member of Litle & 14 Company or was a merchant of Litle & 15 Company, and so Exposures, from that point 16 of view, as a subsidiary or whatever it was 17 of the company that bought it, was still 18 operating with Litle & Company, but not as 19 an independent organization. 20 Q. I think you testified earlier that the 21 members of Litle & Company would accept 22 debit card transactions? 23 A. Yes. 24 Q. Okay. Did Litle & Company know, when it 25 received the information about a</p>

<p style="text-align: right;">Page 206</p> <p>1 transaction, whether it was a debit card 2 transaction or a credit card transaction? 3 A. No. 4 Q. Did Exposures accept debit card 5 transactions? 6 A. Yes. 7 Q. Okay, and how do you know that? Do you 8 independently recall that, or is there a 9 document that refreshes your recollection? 10 A. No. I independently know that. 11 Q. Okay. You could not have found out that 12 information from the transaction information 13 received from Exposures; correct? 14 A. That's correct. 15 Q. Okay. So how else could you learn whether 16 Exposures was accepting debit cards? 17 A. Through the trade newsletters that talked 18 about what percentage of Visa and MasterCard 19 transactions were actually debit cards, or 20 were actually debit cards, rather than 21 credit cards. 22 Q. Okay, and how did that tell you that 23 Exposures itself was accepting debit cards? 24 A. The environment is very statistical. If 25 anybody got ten percent debit cards, then</p>	<p style="text-align: right;">Page 208</p> <p>1 Visa; not as specifically what card type it 2 was. 3 Q. Okay. Well, were catalogers widely 4 accepting Smart Cards in the early 1990's? 5 A. It was accepting -- catalogs were accepting 6 any card that had a valid Visa identifier or 7 a MasterCard identifier. Those identifiers 8 were -- did not identify what type of Visa 9 or MasterCard product it was. So if -- and 10 I don't know what the statistics were for 11 Smart Cards that were used that way, so -- 12 if they were one percent -- I'm speculating 13 now -- then one percent of Exposures' card 14 transactions would have been Smart Cards. 15 It was eerily statistical, how those things 16 worked. 17 Q. Okay. Did Smart Cards ever contain separate 18 identifying numbers, other than a Visa or 19 MasterCard number? 20 A. I don't know. 21 Q. Now, during the normal processing that the 22 old Litle & Company did, as you described in 23 Litle 10, what direct interactions did 24 Litle & Company have with a card issuer, 25 such as Visa or MasterCard?</p>
<p style="text-align: right;">Page 207</p> <p>1 everybody got ten percent debit cards, plus 2 or minus half a percent. 3 Q. So you would have the same testimony with 4 respect to Museum Publications of America? 5 A. Yes. 6 Q. Okay. Did you ever have any communications 7 with either Exposures or Museum Publications 8 of America in which it was disclosed to you 9 specifically that those companies accepted 10 debit cards? 11 A. No. 12 Q. Are you aware of any documentation that 13 would reflect that, in fact, Exposures or 14 Museum Publications of America would accept 15 debit cards? 16 A. Not other than the statistical data 17 published by the industry press. 18 Q. And do you know whether Exposures or Museum 19 Publications of America accepted Smart 20 Cards? 21 A. Same answer as for debit cards. We would 22 have received -- if a debit card had 23 something that was used that looked like a 24 MasterCard number or a Visa number, we 25 would have known it as a MasterCard or a</p>	<p style="text-align: right;">Page 209</p> <p>1 A. First of all, Visa and MasterCard are not 2 card issuers. The member banks of Visa and 3 MasterCard are card issuers, and they're 4 separated from the payment processors by the 5 Visa and MasterCard network, so our 6 communications was through the Visa and 7 MasterCard network, and the closest 8 communications we had directly with them was 9 when we got a chargeback and there was some 10 sort of dispute, so we'd call up the bank 11 and try to work it out, but as a general 12 matter, of course, other than stuff like 13 that, we had no conversation with them. 14 Although, for independent reasons, I knew a 15 lot of people and was friendly with them, 16 but we didn't have any contracts with them, 17 if that's your question. 18 Q. And would what you just described about the 19 degree of interaction with the card issuers 20 apply also to the process in which postage 21 financing would be involved? 22 A. I think I understand your question, but 23 could you ask it again? 24 MR. GRAY: Objection. 25 Q. Okay. The addition of postage financing, as</p>

<p style="text-align: right;">Page 210</p> <p>1 part of the process, would not change the</p> <p>2 amount of interaction you would have with</p> <p>3 the card issuers; correct?</p> <p>4 A. That's true.</p> <p>5 Q. Now, before, you made a reference to the</p> <p>6 fact that transactions were processed in</p> <p>7 bulk. What did you mean by that?</p> <p>8 A. I have to ask him a question.</p> <p>9 MR. SMITH: Do you recall?</p> <p>10 A. I believe the reference is when we</p> <p>11 instructed First of Louisville to make the</p> <p>12 funds transfer, I said that funds transfer</p> <p>13 was basically in bulk or the -- when Visa's</p> <p>14 network paid off the transactions that we</p> <p>15 processed to First Bank of Louisville, it</p> <p>16 was a single-funds transfer --</p> <p>17 Q. Okay.</p> <p>18 A. -- and First National Bank of Louisville had</p> <p>19 to separate themselves, which of those funds</p> <p>20 were associated with our merchants and which</p> <p>21 ones were associated with other merchants,</p> <p>22 and then, within that group, we had to</p> <p>23 figure out, of those funds, which were</p> <p>24 associated with our -- which of our specific</p> <p>25 merchants got what funds, and I think that's</p>	<p style="text-align: right;">Page 212</p> <p>1 A. I don't remember that.</p> <p>2 Q. Okay. If you could refer back to Litle 4.</p> <p>3 A. Yeah.</p> <p>4 Q. Okay, and I want to refer you to Page 19,</p> <p>5 and this is Section 3, Sub-section d, and it</p> <p>6 states "Daily, Litle shall calculate the</p> <p>7 gross proceeds, processing fees, pass</p> <p>8 through fees, released chargebacks, net</p> <p>9 proceeds, and prepayment with respect to all</p> <p>10 sales records and refunds properly presented</p> <p>11 by Litle to NPC on the preceding business</p> <p>12 day."</p> <p>13 A. Yeah.</p> <p>14 Q. Okay. Are those calculations what you were</p> <p>15 referring to as instructions?</p> <p>16 A. No.</p> <p>17 Q. Okay. So were there calculations that were</p> <p>18 provided, separate and apart from</p> <p>19 instructions?</p> <p>20 A. Yes.</p> <p>21 Q. And when would Litle & Company provide the</p> <p>22 calculations during this process?</p> <p>23 A. This was -- the calculations were the</p> <p>24 reporting to the merchants, so the merchants</p> <p>25 themselves could figure out what -- you</p>
<p style="text-align: right;">Page 211</p> <p>1 what I meant, "in bulk." Visa and</p> <p>2 MasterCard, when they wired the money to</p> <p>3 First of Louisville, they didn't have a</p> <p>4 clue, other than what the total amount was.</p> <p>5 Q. Okay, and First of Louisville didn't know --</p> <p>6 have a clue about the amounts either, other</p> <p>7 than what you told them?</p> <p>8 A. That's true.</p> <p>9 Q. And it was the First of Louisville that</p> <p>10 would go ahead and forward amounts, whether</p> <p>11 to the members' bank accounts or to some</p> <p>12 other location?</p> <p>13 A. Yes, based on our instructions.</p> <p>14 Q. Now, you make a reference to instructions.</p> <p>15 Did the Member Agreement specifically</p> <p>16 require Litle & Company to provide</p> <p>17 instructions to the First National Bank of</p> <p>18 Louisville?</p> <p>19 A. I don't think the Member Agreements called</p> <p>20 that out, but if we didn't give them the</p> <p>21 instructions, the merchants wouldn't get</p> <p>22 their money.</p> <p>23 Q. The Member Agreements in fact make reference</p> <p>24 to the Litle & Company providing</p> <p>25 calculations.</p>	<p style="text-align: right;">Page 213</p> <p>1 know, what their net proceeds were and --</p> <p>2 Q. Well, under the agreement, weren't the</p> <p>3 calculations supposed to be provided only to</p> <p>4 NPC?</p> <p>5 A. No.</p> <p>6 Q. Could you go to Section 3, Sub-section e?</p> <p>7 A. Yeah.</p> <p>8 Q. Okay. The first sentence states "Litle</p> <p>9 shall promptly provide to NPC the results of</p> <p>10 the calculations described in Paragraph 3.d</p> <p>11 above in sufficient time for NPC and FNBL</p> <p>12 reasonably to meet the processing cycle set</p> <p>13 forth on Schedule C of the agreement." Does</p> <p>14 that indicate that the calculations were</p> <p>15 supposed to be provided to NPC?</p> <p>16 A. You're confused. I'm not sure how I should</p> <p>17 help you.</p> <p>18 Q. Well, explain to me how I'm confused.</p> <p>19 MR. SMITH: Objection.</p> <p>20 Q. Limited only to this provision in the</p> <p>21 contract.</p> <p>22 MR. GRAY: Objection.</p> <p>23 A. There are basically two audiences for our</p> <p>24 calculations.</p> <p>25 Q. Correct.</p>

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1 A. One was for the merchant to give them their
 2 reporting, so they would understand what
 3 their daily fees were and all the
 4 information they needed in order to conduct
 5 their business properly, and we generally
 6 refer to that as "reporting," and after we
 7 figured out what we were going to report to
 8 the merchant, there was -- part of that was
 9 the amount of money that was going to be
 10 transferred to them --
 11 Q. And that's the --
 12 A. -- and that's the instruction we gave to
 13 NPC. We said, "Fundamentally, based on our
 14 calculations, this means that you should
 15 wire this amount of money from our
 16 distribution account to the merchant."
 17 Q. Okay. Well, I'm going to refer back again
 18 to Section e here, and it's talking about
 19 Little promptly providing to NPC results of
 20 the calculations.
 21 A. The results of the calculation meant the
 22 amount to be transferred.
 23 Q. The instructions?
 24 A. Yes.
 25 Q. Okay. So Paragraph e is describing the

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1 instructions you've been testifying to
 2 today?
 3 A. Yes.
 4 Q. All right, and those instructions would be
 5 provided after the sales records for the
 6 transactions had previously been provided to
 7 NPC?
 8 MR. SMITH: Objection.
 9 A. It was in conjunction with the sales
 10 transactions. When we provided the sales --
 11 the records, the sales and refunds to NPC --
 12 Q. Uh-huh.
 13 A. -- we added them up and that was part of the
 14 calculation to give to the merchant, but the
 15 instructions of how much to wire wasn't
 16 necessarily and usually wasn't the sum of
 17 the sales minus the refunds because there's
 18 other stuff in there. There were
 19 chargebacks, there were fees, there were
 20 changes to the reserve account, there were
 21 payments to third parties, which is what
 22 you're interested in. Anyway, the net
 23 result of all of that stuff was what we told
 24 NPC to wire from the distribution account to
 25 the merchant.

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1 Q. Okay, and when you provided the instructions
 2 to NPC, at that time, it was NPC's
 3 obligation to obtain actual amount from the
 4 card issuers?
 5 A. No.
 6 Q. Okay. Who would actually go and get the
 7 money from the card issuers?
 8 A. Nobody would go and get the money from the
 9 card issuer. Oh, Visa would. Visa had a
 10 clearinghouse operation where, every day,
 11 Visa presented a bill to the card issuers
 12 for all the money they owed to all the
 13 merchants that charged any credit cards to
 14 the cards they had issued, and they put all
 15 of that money into the clearinghouse. The
 16 clearinghouse then figured out how much of
 17 that money should go to First National Bank
 18 of Louisville, CitiCorp, and everybody
 19 else. First National got theirs. They
 20 separated it between us and everybody else.
 21 We got ours. We split it up among the
 22 merchants.
 23 Q. Okay. What was the purpose of providing the
 24 calculations to NPC, as opposed to First
 25 National Bank of Louisville?

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1 A. NPC and the First National Bank of
 2 Louisville, remember, there was that
 3 transition time, as far as we were
 4 concerned, that was synonymous. They were
 5 the same people. It was the same thing, as
 6 far as we were concerned. That really was
 7 to the First of Louisville.
 8 Q. What was the relationship between NPC and
 9 the First National Bank?
 10 A. NPC was wholly-owned by First National Bank
 11 of Louisville.
 12 Q. And what was NPC's function in this
 13 process?
 14 A. NPC was the group that knew about credit
 15 card processing, so First National Bank of
 16 Louisville had the -- they delegated their
 17 responsibility, according to the Visa and
 18 MasterCard regulations, to the people that
 19 would have considered themselves working for
 20 NPC. However, if you noticed, NPC and First
 21 of Louisville both signed one of the
 22 agreements and it was the same guy.
 23 Q. Did NPC itself have any responsibility for
 24 supervising or managing the manner in which
 25 First of Louisville would distribute funds?

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1 MR. SMITH: Objection.
 2 A. Any instructions for First of Louisville to
 3 distribute funds probably would have been
 4 executed -- I don't know, actually, but it
 5 very well could have been executed by NPC
 6 personnel. It was fundamentally the same
 7 thing.
 8 Q. So you don't know -- when you sent the
 9 instructions, you wouldn't know exactly
 10 which personnel, as between NPC personnel or
 11 First National personnel, would actually be
 12 involved in executing the instructions?
 13 A. The personnel were generally personnel of
 14 both companies.
 15 Q. All right. Which one of the companies had
 16 the contractual obligation to make sure
 17 that the funds were distributed
 18 appropriately?
 19 A. Based on Visa and MasterCard regulations,
 20 First of Louisville, but again, it was
 21 really unclear at the time. People were
 22 sort of thrashing around trying to figure
 23 all that out, and I probably didn't know for
 24 sure and I didn't care, either, just as long
 25 as it got done.

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1 Q. Let me go back to Exhibit 8.
 2 A. Yeah.
 3 MR. EDELMAN: Before I proceed, I
 4 know this was marked "Outside counsel eyes
 5 only." Is this a concern of you, in terms
 6 of asking questions on that?
 7 MR. SMITH: Not by us.
 8 MS. PRESTON: It was designated by
 9 us. I think that you produced it, as well.
 10 MR. EDELMAN: Do you have any
 11 objection to us asking questions about this
 12 while Mr. Sanz is present?
 13 MR. SMITH: Do I have any
 14 questions? No, but I'm not a party to the
 15 protective order, so that's between you
 16 guys.
 17 MR. EDELMAN: Okay. It's marked
 18 "outside counsel eyes." I --
 19 MR. GRAY: Yeah. Right. We don't
 20 have a problem with that. We did that to
 21 protect his confidentiality. We'll remove
 22 the designation of Exhibit 8 and designate
 23 it "Confidential."
 24 Q. You say the memo was sent to John Shirey?
 25 A. Shirey, yes.

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1 Q. Shirey. I'm sorry. What was his title at
 2 the time of Litle & Company?
 3 A. He might have been our CFO then.
 4 Q. Was he CFO at the time that Litle & Company
 5 was sold, 1995?
 6 A. No.
 7 Q. Did he leave the company before that time?
 8 A. Yes.
 9 Q. Okay.
 10 A. Then he came back.
 11 Q. Did he come back before 1995?
 12 A. Uh-huh.
 13 Q. Okay. So when he came back to Litle &
 14 Company, what was his position at that
 15 time?
 16 A. It wasn't CFO. I don't remember what it
 17 was.
 18 Q. Where is Mr. Shirey employed now, if you
 19 know?
 20 A. Paymentech.
 21 Q. Have you contacted Mr. Shirey about this
 22 litigation?
 23 A. No.
 24 Q. And who is Steve Tritman?
 25 A. He is the guy that was working with us at

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1 that point in time who didn't work with us
 2 very long.
 3 Q. Was he an employee of Litle & Company?
 4 A. Yes.
 5 Q. And what was his position?
 6 A. I don't remember. It might have been chief
 7 operating officer. Something like that.
 8 Q. Do you know whether this memorandum was ever
 9 forwarded to anyone, other than Mr. Shirey
 10 or Mr. Tritman?
 11 A. No, I don't.
 12 Q. Okay. I want to go down to the fourth
 13 paragraph on the first page.
 14 A. Numbered paragraph?
 15 Q. It starts with the words "I suggest."
 16 A. Yeah.
 17 Q. The third sentence states "We already have
 18 the requirement that we be paid in one day
 19 if the account balance goes negative so we
 20 are protected contractually on negative
 21 balances." What did you mean when you said
 22 you were protected contractually against
 23 negative balances?
 24 A. If we received a settlement file that had
 25 more refunds, in terms of dollars, than

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<p style="text-align: right;">Page 222</p> <p>1 sales, in terms of dollars, that meant we</p> <p>2 owed the merchant money -- no. That meant</p> <p>3 the merchant owed us money, rather than the</p> <p>4 other way around, and under those</p> <p>5 circumstances, we could do an ACH debit and</p> <p>6 take money out of their account.</p> <p>7 Q. When you say "take money out of their</p> <p>8 account," you're referring to the merchant's</p> <p>9 account?</p> <p>10 A. Right.</p> <p>11 Q. Okay, and did Litle & Company have the</p> <p>12 ability to go into the bank account of the</p> <p>13 member and debit that account?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. Did it do that through First of</p> <p>16 Louisville or did it do that directly?</p> <p>17 A. No. It was an instruction to First of</p> <p>18 Louisville.</p> <p>19 Q. Okay. So the company that would actually</p> <p>20 debit the account would be First of</p> <p>21 Louisville?</p> <p>22 A. That's right.</p> <p>23 Q. The next sentence states "I would assume</p> <p>24 that the 'conditional' nature of our credit</p> <p>25 card advances will protect us in a Chapter</p>	<p style="text-align: right;">Page 224</p> <p>1 card, if it turned out that it was a bad</p> <p>2 credit card or a fraud or it turned into a</p> <p>3 chargeback, then we could unwind the</p> <p>4 conditional purchase and get our money back</p> <p>5 from the merchant. That had nothing to do</p> <p>6 with the advances. It was just the way the</p> <p>7 contract was set up.</p> <p>8 Q. And did the Member Agreement with Exposures</p> <p>9 ultimately implement this conditional nature</p> <p>10 of the credit card advances?</p> <p>11 A. You're asking me stuff I just don't remember</p> <p>12 the specifics of.</p> <p>13 Q. Now, if you could go to the numbered</p> <p>14 Paragraph 3 at the bottom, it states "It</p> <p>15 should be clear that all of the conditions</p> <p>16 of our processing contract are still in</p> <p>17 force." Is the processing contract you</p> <p>18 refer to there the Member Agreement --</p> <p>19 A. Yes.</p> <p>20 Q. Other than a Member Agreement, were there</p> <p>21 any other standard type of documents that a</p> <p>22 member would sign?</p> <p>23 A. Sometimes they'd sign a personal guaranty.</p> <p>24 Sometimes they'd sign a cross-company</p> <p>25 guaranty, where there were a number of</p>
<p style="text-align: right;">Page 223</p> <p>1 11 situation, but if it doesn't, we</p> <p>2 obviously have to fix the contract so it</p> <p>3 does." What did you mean by the conditional</p> <p>4 nature of the credit card?</p> <p>5 A. I think in the agreement, it says we</p> <p>6 conditionally purchase -- the purchase of</p> <p>7 the credit card transactions is conditional</p> <p>8 on the fact that those are good transactions</p> <p>9 and they don't have chargebacks against</p> <p>10 them, et cetera, and I don't remember</p> <p>11 exactly, but I think the conditional nature</p> <p>12 meant that we felt we were protected in a</p> <p>13 Chapter 11 situation of being -- of being in</p> <p>14 the general creditor pool in a way that</p> <p>15 would disadvantage us. I think we came</p> <p>16 ahead of the general creditors. I don't</p> <p>17 really remember the technical part, but we</p> <p>18 had a pretty senior position, based on</p> <p>19 the --</p> <p>20 Q. When you say "conditional," was there a</p> <p>21 particular type of conditions you were</p> <p>22 thinking of that you were placing on the</p> <p>23 credit card advances or did you just more</p> <p>24 generally?</p> <p>25 A. No. Generally, when we purchased a credit</p>	<p style="text-align: right;">Page 225</p> <p>1 commonly-owned companies, like the</p> <p>2 info-mercial business, they had a company</p> <p>3 for every product, and if a product went</p> <p>4 south on a company like that, we expected</p> <p>5 them to pay their obligations, anyway.</p> <p>6 There are probably other ancillary kinds of</p> <p>7 agreements.</p> <p>8 Q. Do you recall the phrase "Master Membership</p> <p>9 Agreement"?</p> <p>10 A. Yeah.</p> <p>11 Q. Was that just another name for the standard</p> <p>12 Merchant Agreement?</p> <p>13 A. No.</p> <p>14 Q. Okay. What was the Master Membership</p> <p>15 Agreement?</p> <p>16 A. What I was trying to do was to set up a</p> <p>17 one-page Master Membership Agreement, which</p> <p>18 meant that every other type of product we</p> <p>19 offer, under that, they would get an</p> <p>20 addendum to the Master Agreement that didn't</p> <p>21 have to be signed, but if they used the</p> <p>22 product, they had one transaction that used</p> <p>23 that product, and they used it in any way</p> <p>24 that it was obvious they used the product,</p> <p>25 then that piece of agreement was in force.</p>

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1 We never did quite get that figured out, so
 2 I don't think that applies here.
 3 Q. Okay. You never actually completed a Master
 4 Membership Agreement?
 5 A. I think we did with some people, but it
 6 turned out to be cumbersome.
 7 Q. Do you know whether Exposures or Museum
 8 Publications of America ever signed a Master
 9 Membership Agreement?
 10 A. If they did, it was -- in my sense, it was
 11 superceded by what you see as a Member
 12 Agreement.
 13 Q. But you can't recall whether they originally
 14 signed one or not at this point?
 15 A. No.
 16 Q. If you could go to the next page, Paragraph
 17 4, it states "We should indicate what
 18 percentage of the Visa/MasterCard sale
 19 deposits will be deducted from each payment
 20 to the member. Note that this is not net
 21 deposits." Could you explain the difference
 22 between sale deposits and net deposits?
 23 A. Yeah. Sale deposit was for all the sales
 24 that were made for which the merchant or
 25 member was due payment. The net deposit was

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1 less the refunds that the merchant wanted to
 2 send back to the cardholder through the same
 3 mechanism. It was basically a negative
 4 sale, as far as the mechanics were
 5 concerned, and the reason we wanted to do it
 6 on sale transactions is we never really had
 7 any control over what membership refunds
 8 were and it was easier to do it on the sale
 9 transactions.
 10 Q. Okay. Was there anything in the process
 11 that you've described earlier in Little 10
 12 that would differ if it was percentage of a
 13 sale deposit, as opposed to percentage of a
 14 net deposit?
 15 A. Yeah. The amount of money that we would
 16 have gotten by multiplying the net deposits
 17 by the percentage would have been less than
 18 the amount of money we got by multiplying
 19 sale deposits by the --
 20 Q. In both cases, First of Louisville would be
 21 forwarding the amounts?
 22 A. Yeah. They forwarded whatever we told them
 23 and they wouldn't know how we calculated
 24 them.
 25 Q. Okay. The next paragraph -- well, let me

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1 read the first couple of sentences into the
 2 record. "We have to identify what the fee
 3 should be. My sense is that we do something
 4 like deduct 21 percent from the
 5 Visa/MasterCard proceeds, of which we keep
 6 one percent and 20 percent goes back to the
 7 member." What did you mean when you said
 8 "20 percent goes back to the member"?
 9 A. The original way we were trying to figure
 10 out how to collect our fee would be a
 11 percentage of what we withheld from the
 12 member; i.e., if 20 percent was how much we
 13 were withholding from the member and paying
 14 to the third party, we would actually
 15 withhold 21 percent and keep one percent.
 16 That was the engineering in me talking. It
 17 was trying to be too precise and I don't
 18 think we ever did it that way. I think we
 19 simply added the fee, our fee, to the total
 20 amount they owed us and then took out our
 21 fee first.
 22 Q. Well, why is there a reference to the 20
 23 percent going back to the member?
 24 A. Oh, 20 percent going back to the member? I
 25 think that's a mistake. I think it should

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1 be the 20 percent going to the third party.
 2 Q. Now, with respect to Exposures, was Little &
 3 Company responsible for obtaining
 4 authorization for the credit card payments?
 5 A. Yes.
 6 Q. And Exposures did that through sending a
 7 request that ultimately went to the card
 8 issuers?
 9 A. Yes.
 10 Q. Okay, and the response to that authorization
 11 request would come back from the card
 12 issuers to you at Little?
 13 A. Typically, from the card issuer to the
 14 Visa/MasterCard card network, in those days,
 15 from NDC, then back to us, and then back to
 16 the merchant.
 17 Q. Did NPC have any involvement in
 18 authorization requests?
 19 A. Yes, in the fact that they the contract with
 20 NDC, under which we operated.
 21 Q. But did NPC directly involve itself in the
 22 authorization process?
 23 A. I do not believe so.
 24 Q. Okay. Did First of Louisville?
 25 A. No.

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1 MS. PRESTON: Michael, would this
2 be a good time to take a short break?
3 MR. EDELMAN: Yes.
4 THE VIDEOGRAPHER: The time is
5 3:55. This is the end of Cassette 3 and
6 we're off the record.
7 (Discussion off the record.)
8 (Recess.)
9 THE VIDEOGRAPHER: The time is
10 4:11. This is the beginning of Cassette
11 Number 4, the deposition of Thomas Litle.
12 We are on the record.
13 Q. (Cont'd. By Mr. Edelman) now, Before today,
14 had you had any previous communications with
15 counsel for any of the defendants?
16 A. Before today?
17 Q. Yeah.
18 A. I talked to them yesterday.
19 Q. Who did you talk to yesterday?
20 A. I guess, the three lawyers that are here.
21 Q. Okay, and before your discussion with them
22 yesterday, did you have any other
23 conversations with counsel for the
24 defendants?
25 A. I think there was a telephone call, but I

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1 don't remember the content of it and I don't
2 remember who was on it.
3 Q. Do you recall there was a telephone
4 interview which was set up for you to
5 describe Litle & Company's process to the
6 defendants' attorneys?
7 MR. SMITH: Objection. Was the
8 question, "do you recall if"?
9 A. If what?
10 MR. EDELMAN: Go ahead and read it
11 back.
12 (The previous question was read
13 back by the court reporter.)
14 MR. SMITH: Object. I think, lack
15 of foundation. "If" didn't make it on to
16 the record, so maybe you should restate the
17 question.
18 Q. Was there a conversation in which you were
19 interviewed by the defendants' attorneys
20 about the processes used by Litle & Company?
21 MR. SMITH: Object to the term
22 "interview," but otherwise, if you
23 understand the question.
24 A. I don't know exactly what you mean by "the
25 processes used by Litle & Company."

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1 Q. This first telephone conversation that you
2 had with defendants' counsel, what counsel
3 did you talk to?
4 A. I don't remember who was on it. I could
5 tell you the basis of the conversation, if
6 that makes --
7 MR. SMITH: Well --
8 Q. Sure. Go ahead.
9 A. They were trying to figure out whether I was
10 a witness that would be able to -- that
11 understood the situation and could talk
12 about the patent issue and whether I had any
13 knowledge of any kind of funding for
14 merchants and whether we had been repaid
15 using the credit card processing mechanism,
16 and I think they were just trying to figure
17 out whether they should talk to me again or
18 not.
19 Q. And was the patent issued to Advanceme
20 discussed during that conversation?
21 A. Well, I knew it was a patent idea, but the
22 issue -- the things in the patent, I don't
23 remember any discussion about. The first
24 time I ever saw the claims was today.
25 Q. Okay. You said you also had a meeting with

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1 defendants' counsel yesterday?
2 A. Yes.
3 Q. Okay. How long did that meeting take
4 place?
5 A. Boy, I don't know. A couple of hours.
6 Three hours, maybe.
7 Q. And what did you discuss with defendants'
8 counsel during that meeting?
9 A. Same kind of stuff. They wanted to
10 understand what we did. I don't think we
11 discussed anything that hasn't been
12 discussed today.
13 Q. Okay. Did you get up on a board and draw
14 the payment process, similar to what you did
15 today?
16 A. Yes.
17 Q. And did you draw a diagram that was similar
18 to Litle 10 for the attorneys yesterday?
19 A. I suppose it was similar. When I do that,
20 they never come out the same way.
21 Q. And did counsel tell you that they would ask
22 you to make the same drawing during the
23 deposition?
24 A. No. They told me that I might have to
25 explain what the situation was. I'm more

59 (Pages 230 to 233)

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1 comfortable doing the drawing.
 2 Q. Did counsel yesterday give you a copy of the
 3 patent?
 4 A. I don't think so.
 5 Q. Okay. Have you ever received a copy of the
 6 patent?
 7 A. I think I have received a copy of the
 8 patent. I know I've never read it.
 9 Q. Who sent you a copy of the patent?
 10 MR. SMITH: If that was something
 11 that I sent you or something that was
 12 provided to you by counsel --
 13 A. Yeah, probably.
 14 Q. Other than your counsel, did anybody else
 15 produce the patent to you?
 16 A. It's possible. I don't remember. I've been
 17 pretty busy these days. I don't answer much
 18 of any e-mail or read anything.
 19 MR. EDELMAN: Let me mark as next
 20 in order Exhibit Number 15.
 21 (One-page e-mail dated April 26,
 22 2006 is marked Exhibit Number 15
 23 for Identification.)
 24 Q. I'm just trying to pin down the date of your
 25 initial communication with anyone about this

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1 litigation. Could you look at document
 2 marked as --
 3 MR. SMITH: Is there a question?
 4 Q. If you could review the document marked as
 5 Exhibit Number 15.
 6 A. Yeah.
 7 Q. Is this e-mail sent about the time that you
 8 initially had a communication with Mr.
 9 Goldin?
 10 A. I would suspect so, yes.
 11 Q. Okay. So it was in about April of 2006 when
 12 you first learned about this lawsuit?
 13 A. That's right.
 14 Q. Okay. During the initial conversation with
 15 Mr. Goldin, did he ask whether you could
 16 search for particular information about
 17 postage financing?
 18 A. I don't remember if it was the initial
 19 conversation. At some point, he asked me if
 20 we had any documentation about it, and I
 21 said no, I didn't think so, but all that
 22 kind of documentation would be at
 23 Paymentech.
 24 Q. And did you agree with Mr. Goldin that you
 25 would make an effort to try to track down

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1 any documentation?
 2 A. I believe so, and that resulted in my call
 3 to Mike Duffy.
 4 Q. Why did you agree to make that effort?
 5 MR. SMITH: Objection.
 6 A. Because he asked me to and I figured it was
 7 what he was looking for, so I was going to
 8 try and help him out.
 9 Q. Why did you want to help him out?
 10 MR. SMITH: Objection.
 11 A. Why would I not want to help him out? I
 12 don't know. It's the same question. I try
 13 to help everybody out. That's one of the
 14 reasons we do so well in the industry.
 15 Everybody in the industry owes me a favor,
 16 one way or another.
 17 Q. At some point, did you reach a belief that
 18 the inventions in the Advanceme patent had
 19 been practiced by the old Litle & Company?
 20 A. Yes.
 21 Q. Okay, and when did you reach that belief?
 22 A. When I understood what the basis of the
 23 patent was.
 24 Q. And how did you understand what the basis of
 25 the patent was?

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1 A. Because David told me in a simplified form.
 2 Q. So Mr. Goldin described to you what the
 3 patent was, and based on Mr. Goldin's
 4 description --
 5 A. No. It was more he described what his
 6 company did and that he was getting sued by
 7 you guys because you thought that you held
 8 the rights to do what he was doing, and it
 9 sounded to me a hell of a lot like that's
 10 something we had done as far back as 1982 or
 11 '3.
 12 Q. And Mr. Goldin also sent you the patent;
 13 correct?
 14 A. He may have. I may have received the
 15 patent, and he probably -- if I did, he
 16 probably expected me to read it, but I
 17 didn't.
 18 Q. So let me make get it straight. You
 19 performed a belief on whether the old
 20 Litle & Company was performing the patent
 21 inventions, but you didn't bother to read
 22 the patent that was sent to you?
 23 MR. SMITH: Objection. Object to
 24 the form. Compound question.
 25 A. Ask it in two pieces and I'll answer it.

60 (Pages 234 to 237)

<p style="text-align: right;">Page 238</p> <p>1 MR. EDELMAN: That's a perfectly 2 appropriate question. 3 A. Sort of like "When did you stop beating your 4 wife?" Right? 5 MR. EDELMAN: Read it back. 6 (The previous question was read 7 back by the court reporter.) 8 MR. SMITH: Objection. 9 Argumentive. Object to the form. If you 10 understand the question, you can answer it. 11 A. I do understand it. It's two questions. 12 One is, did I form an opinion on what the 13 patent was all about based on conversations 14 with David and his description of what his 15 company was doing that, theoretically, was 16 in violation of the patent, and the answer 17 was yes, I got a sense of what the patent 18 was all about; and to the second question, 19 even though, you know, as a lawyer, you 20 probably wouldn't approve of this, I did not 21 read the patent. 22 Q. Well, what I'm trying to understand from you 23 is why would you immediately believe what 24 Mr. Goldin had to say about the nature of 25 the patent inventions, instead of just</p>	<p style="text-align: right;">Page 240</p> <p>1 again, you can do it -- 2 Q. How long have you had the patent in your 3 possession? 4 A. I don't know that I have it in my 5 possession, even now. If you show me a copy 6 of something that I got, I would believe 7 that I have it, but I have not read it. 8 Q. Did you ever ask anyone for a copy of the 9 patent? 10 MR. SMITH: Apart from 11 conversations you might have had with me, 12 your counsel. 13 A. I don't remember. I might have. 14 Q. Now, during the first interview that -- I'm 15 sorry. 16 MR. EDELMAN: Strike that. 17 Q. During the first discussion you had on the 18 telephone with defendants' counsel, was Mr. 19 Goldin present on that conversation? 20 MR. SMITH: If you know. 21 A. I think so, yes. 22 Q. Okay, and were there any other subjects 23 discussed during that conversation, other 24 than issues related to the patent? 25 MR. SMITH: Objection.</p>
<p style="text-align: right;">Page 239</p> <p>1 reading the patent? 2 MR. SMITH: Objection. 3 Argumentive. 4 A. I guess that's because you're a lawyer and 5 I'm an engineer. That's the way I -- 6 Q. You found Mr. Goldin's words to you about 7 what the patent inventions were was more 8 trustworthy than what the patent said? 9 MR. SMITH: Objection. Calls for 10 speculation. Object to the form. 11 Argumentative. 12 A. If he was -- if he was being sued -- 13 MR. GRAY: Objection. Lack of 14 foundation. Just answer his question. 15 A. Am I stupid; is that the question? 16 MR. EDELMAN: I'm glad you think 17 it's funny. Could you read back the 18 question? 19 (The previous question was read 20 back by the court reporter.) 21 MR. SMITH: I object. 22 MR. GRAY: Object to the form. 23 MR. SMITH: It's argumentive. I 24 mean, you know, this isn't trial. If you 25 want to ask him to answer that question</p>	<p style="text-align: right;">Page 241</p> <p>1 A. Not that I remember. 2 Q. Did Mr. Goldin, during that conversation, 3 talk to you about AmeriMerchant's program 4 and whether it could be something Litle & 5 Company would be interested in? 6 MR. SMITH: Objection. Lack of 7 foundation. Assuming facts not in 8 evidence. 9 MS. PRESTON: Too vague. 10 MR. SMITH: If you understand the 11 question, you can answer. I don't 12 understand the question. 13 A. I don't remember. I do remember a 14 discussion. I don't remember when it was, 15 that, would it -- is there any way that it 16 would make sense for us to do business 17 together, and I came to a conclusion that 18 there wasn't, and I told him so. 19 Q. And how many discussions did you have with 20 Mr. Goldin on whether it made any sense for 21 the companies to do business together? 22 A. I think, at most, one. 23 Q. Okay, and what did you discuss on that 24 subject? 25 A. Well, I didn't know how he was advancing, or</p>

<p style="text-align: right;">Page 242</p> <p>1 I asked him how his business worked, and he</p> <p>2 said he advanced mostly -- money to mostly</p> <p>3 restaurants. We don't process restaurants.</p> <p>4 Restaurants are a card-present kind of</p> <p>5 transaction. We don't process restaurants,</p> <p>6 and so it didn't make any sense for us to</p> <p>7 pursue any business interest.</p> <p>8 Q. Who brought up the idea that AmeriMerchant</p> <p>9 and Litle & Company might be able to work</p> <p>10 together?</p> <p>11 A. I don't remember. Could have been me.</p> <p>12 We're always interested in customers. If I</p> <p>13 did, I didn't know he was not a</p> <p>14 card-not-present.</p> <p>15 Q. Could it have been Mr. Goldin who brought up</p> <p>16 the idea?</p> <p>17 MR. SMITH: Objection.</p> <p>18 A. I don't remember.</p> <p>19 Q. Did Mr. Goldin send you information about</p> <p>20 AmeriMerchant?</p> <p>21 A. I don't remember getting any real brochures,</p> <p>22 but I might have.</p> <p>23 Q. Okay. Was the discussion that you had with</p> <p>24 Mr. Goldin about the possibility of</p> <p>25 AmeriMerchant and Litle & Company doing</p>	<p style="text-align: right;">Page 244</p> <p>1 true and correct copy of an e-mail chain</p> <p>2 between you and Mr. Goldin?</p> <p>3 A. Looks like it.</p> <p>4 Q. I first direct your attention to the e-mail</p> <p>5 at the bottom of the document from Mr.</p> <p>6 Goldin to yourself, and you see the first</p> <p>7 sentence refers to a schedule/security</p> <p>8 agreement --</p> <p>9 A. Yeah.</p> <p>10 Q. -- of the postage financing agreement. Is</p> <p>11 that the schedule/security agreement</p> <p>12 relating to Exposures that has been marked?</p> <p>13 A. Yes.</p> <p>14 Q. Okay, and the next sentence states "The</p> <p>15 entire document couldn't be located. This</p> <p>16 was all that was apparently in the folder."</p> <p>17 Do you have any understanding of what folder</p> <p>18 is being referenced there?</p> <p>19 A. I would assume it's the contract folder.</p> <p>20 Again, that would be --</p> <p>21 Q. The contact folder in Paymentech?</p> <p>22 A. Yeah, Paymentech. Yes.</p> <p>23 Q. Okay. So this communication was happening</p> <p>24 after you had discussed with Mr. Goldin the</p> <p>25 possibility that there would be documents at</p>
<p style="text-align: right;">Page 243</p> <p>1 business together part of the same</p> <p>2 discussion that you had with defendants'</p> <p>3 counsel about patent issues?</p> <p>4 MR. SMITH: Objection.</p> <p>5 A. I doubt it.</p> <p>6 Q. You believe there was a separate</p> <p>7 conversation?</p> <p>8 A. I don't know. Could have been.</p> <p>9 Q. Do you recall whether it was the same</p> <p>10 conversation or a different conversation?</p> <p>11 A. It was a very short conversation that</p> <p>12 ended when I discovered that he was</p> <p>13 advancing money to restaurants, business</p> <p>14 which we would not have been interested. If</p> <p>15 he was advancing money to card-not-present</p> <p>16 people, we probably would have been</p> <p>17 interested in it.</p> <p>18 MR. EDELMAN: I will mark as next</p> <p>19 in order Number 16.</p> <p>20 (Two-page document consisting of</p> <p>21 e-mails beginning with e-mail dated</p> <p>22 June 27, 2006 is marked Exhibit</p> <p>23 Number 16 for Identification.)</p> <p>24 Q. First, could you tell me whether the</p> <p>25 document marked as Exhibit Number 16 is a</p>	<p style="text-align: right;">Page 245</p> <p>1 Paymentech?</p> <p>2 A. Yes.</p> <p>3 Q. The next sentence states "The patent</p> <p>4 attorneys think it's enough to start and we</p> <p>5 may ask for testimony from you, et cetera,</p> <p>6 that further details how the program worked</p> <p>7 if needed." What did you understand Mr.</p> <p>8 Goldin meant by the statement that "the</p> <p>9 patent attorneys think it's enough to</p> <p>10 start"?</p> <p>11 MR. SMITH: Objection. Calls for</p> <p>12 speculation. Outside of this witness's</p> <p>13 knowledge.</p> <p>14 MR. GRAY: Objection.</p> <p>15 MR. SMITH: You can answer. I</p> <p>16 mean, he's asking you --</p> <p>17 A. They are basically trying to figure out</p> <p>18 whether I would be helpful to their case, I</p> <p>19 think.</p> <p>20 Q. If you could go up to your response to the</p> <p>21 e-mail to Mr. Goldin?</p> <p>22 A. Uh-huh.</p> <p>23 Q. First sentence states "This is great that</p> <p>24 they found something in the file." Does</p> <p>25 that indicate that, by this point, you had</p>

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1 already formed an opinion that Litle &
 2 Company's process included the inventions in
 3 the patent?
 4 MR. SMITH: Objection.
 5 A. Litle & Company's process included the
 6 patent?
 7 Q. Well, why did you think it was great that
 8 Mr. Goldin found something in the file?
 9 A. Because I thought it was unlikely Paymentech
 10 could find anything, and they were also
 11 competitors, so I thought it was unlikely
 12 they'd even try.
 13 Q. Okay. The next sentence states "Perhaps"
 14 they have some operating documentation that
 15 shows that proceeds were deducted each
 16 day."
 17 A. Right.
 18 Q. Was any of that operating documentation ever
 19 located to produce in response to the
 20 Advanceme subpoena?
 21 MR. SMITH: To Advanceme subpoena
 22 on who?
 23 MR. EDELMAN: Mr. Litle.
 24 A. I didn't have any of it. I wouldn't expect
 25 I would.

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1 Q. Okay. What operating documentation did you
 2 have in mind?
 3 A. It would be the calculations of the -- what
 4 had been previously referred to as the
 5 calculations from which the instructions
 6 would be derived to -- that we gave to First
 7 of Louisville.
 8 Q. Okay. The e-mail also makes a reference to
 9 an Allen Abbott?
 10 A. Uh-huh.
 11 Q. Mr. Abbott was the treasurer of Exposures in
 12 the early 1990's?
 13 A. I believe he was the CFO.
 14 Q. Okay, and during your communication with Mr.
 15 Abbott back in the 1990's, was Mr. Abbott
 16 one of the people that worked with you in
 17 formulating the postage finance program?
 18 A. Yes.
 19 Q. When was the last time you spoke to Mr.
 20 Abbott?
 21 A. A couple of months ago.
 22 Q. And did you speak with him about this case?
 23 A. Yes.
 24 Q. Okay, and what did you talk about with Mr.
 25 Abbott?

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1 A. I think it was before we found those
 2 documents, actually, and I just asked him if
 3 he remembered the postage financing, and he
 4 should get in touch with David, if he did.
 5 Q. Okay. Did you talk to Mr. Abbott before
 6 this June e-mail was sent?
 7 A. Yes. Not about this, necessarily, or --
 8 yes, I think it was probably before this.
 9 Q. Okay. Other than the communication you just
 10 talked about with respect to the patent, are
 11 you in regular communication with Mr.
 12 Abbott?
 13 A. Yeah. He's an active part of the catalog
 14 and direct marketing community, and I see
 15 him at trade shows, and I consider him a
 16 friend and he considers me a friend, I
 17 think.
 18 Q. Now, do you see, getting towards the middle
 19 of the document, it says "Exposures was the
 20 first of these agreements."
 21 A. Yeah.
 22 Q. Does that mean that Exposures was the first
 23 company that entered into a postage finance
 24 agreement with Litle & Company?
 25 A. Yes.

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1 Q. Okay. Then in parentheses it makes a
 2 reference to "the original group we did in
 3 the early to mid eighties." What is that a
 4 reference to?
 5 A. Oh, that was not postage financing. The
 6 early to mid eighties was when we collected
 7 the fulfillment fees from the clients way
 8 back in DMGT days.
 9 Q. Okay. So that was not done at Litle &
 10 Company?
 11 A. That's right.
 12 Q. Okay. Are you aware of any documentation
 13 that would reflect the fulfillment fees
 14 process that you're describing in the early
 15 to mid 1980's?
 16 A. I am not aware of any, but DMGT was also
 17 part of the sale to Paymentech, and so
 18 Paymentech would have those, and that's sort
 19 of documents once removed. So I think
 20 chances of finding any of that stuff is
 21 pretty low.
 22 Q. The next sentence states "Hearthsong came
 23 later, as well as others that I don't
 24 remember." So was Hearthsong another
 25 company that entered into an agreement with

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<p style="text-align: right;">Page 250</p> <p>1 Litle & Company for postage financing?</p> <p>2 A. Yes.</p> <p>3 Q. And did Hearthsong sign a Member Agreement?</p> <p>4 A. Yes.</p> <p>5 Q. Okay, and was that a Member Agreement</p> <p>6 similar to the Member Agreement attached --</p> <p>7 A. I obviously don't remember specifically, but</p> <p>8 they were all similar, so I would assume</p> <p>9 that's the case.</p> <p>10 Q. Do you know whether there was any effort to</p> <p>11 ask Paymentech to search for any documents</p> <p>12 relating to Hearthsong?</p> <p>13 A. I think so. I think I would have -- I don't</p> <p>14 remember specifically, but I would have</p> <p>15 asked for the Exposures -- no. I do</p> <p>16 remember. I asked for Exposures and</p> <p>17 Hearthsong. I did not ask for Museum</p> <p>18 collections because I didn't remember them</p> <p>19 at the time.</p> <p>20 Q. Other than Exposures, Hearthsong, and Museum</p> <p>21 Publications of America, are there any other</p> <p>22 merchants that you recall that entered into</p> <p>23 postage finance agreements?</p> <p>24 A. Yeah, there were a number, but I can't</p> <p>25 remember what their names were.</p>	<p style="text-align: right;">Page 252</p> <p>1 MR. SMITH: Objection.</p> <p>2 A. I think so, yeah.</p> <p>3 Q. Are there any other specific changes that</p> <p>4 you can identify in the postage financing</p> <p>5 program between the Exposures agreement and</p> <p>6 agreements that came later on?</p> <p>7 A. No. Like the fee thing, they would have</p> <p>8 been fairly minor in the scheme of things.</p> <p>9 The general idea was --</p> <p>10 MR. GRAY: Objection. Are you</p> <p>11 referring to the Litle fees from Exhibit 4,</p> <p>12 or are you referring to the management fee</p> <p>13 from the promissory note?</p> <p>14 MR. EDELMAN: I'm referring to the</p> <p>15 Litle fees from Exhibit 4. Actually, I'm</p> <p>16 not sure. I don't understand your</p> <p>17 question. I object.</p> <p>18 THE WITNESS: It's catchy.</p> <p>19 MR. GRAY: I'm sorry to interrupt.</p> <p>20 I feel like you guys are going back and</p> <p>21 forth. The Litle fees were defined as the</p> <p>22 processing fees on Exhibit 4. The</p> <p>23 management fee is the fee Litle & Company</p> <p>24 charged for the postage advance.</p> <p>25 MR. EDELMAN: Right. What I'm</p>
<p style="text-align: right;">Page 251</p> <p>1 Q. Okay. I'm asking, was there any other names</p> <p>2 that you can recall?</p> <p>3 A. Huh?</p> <p>4 Q. I was asking, were there any other names</p> <p>5 that you can recall?</p> <p>6 A. No.</p> <p>7 Q. Now, in the fourth sentence in this</p> <p>8 paragraph, it states "As we continued the</p> <p>9 program, it became more defined." What did</p> <p>10 you mean by that?</p> <p>11 A. Well, the difference between the</p> <p>12 documentation behind the Exposures agreement</p> <p>13 and the Museum Collections agreement was</p> <p>14 improved and changed and more descriptive</p> <p>15 and our fees were defined on when we</p> <p>16 collected them and the procedure was more</p> <p>17 crisp, and it was just a result of</p> <p>18 experience over doing this a number of</p> <p>19 times.</p> <p>20 Q. And was one of the changes that the</p> <p>21 repayments would be first taken out of</p> <p>22 Litle's fees?</p> <p>23 A. The payment be taken out of Litle's fees?</p> <p>24 Q. I'm sorry. That the repayment would first</p> <p>25 be applied with respect to Litle's fees.</p>	<p style="text-align: right;">Page 253</p> <p>1 getting at is whether the repayment was</p> <p>2 first applied to the management fee.</p> <p>3 MR. GRAY: The management fee.</p> <p>4 Okay.</p> <p>5 THE WITNESS: Yes, I understood it</p> <p>6 that way.</p> <p>7 MR. SMITH: You understood it that</p> <p>8 way?</p> <p>9 Q. Now, this process that you diagrammed on</p> <p>10 Litle 10, is it fair to say that that same</p> <p>11 basic process applied to every merchant</p> <p>12 under the postage financing program?</p> <p>13 A. Yes.</p> <p>14 Q. Was there a distinction in the Member</p> <p>15 Agreements between purchase sales and</p> <p>16 conveyed sales?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. What is that distinction?</p> <p>19 A. The purchase sales were Visa and MasterCard</p> <p>20 sales in which we took liability for the</p> <p>21 merchant's behavior. Conveyed sales were</p> <p>22 the merchants had agreements directly with,</p> <p>23 say, American Express, and all we did was</p> <p>24 facilitate the delivery of transactions to</p> <p>25 American Express and facilitate</p>

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1 authorizations. If the merchant went out
 2 business and stuck all the consumers and the
 3 consumer wanted their money back, they would
 4 get it back from American Express, not from
 5 us.
 6 Q. Did the standard Member Agreement encompass
 7 both purchase sales and conveyed sales?
 8 A. Usually.
 9 Q. And did the standard Member Agreements
 10 encompass both debit card transactions, as
 11 well as charge card transactions?
 12 A. Well, as I testified earlier, the debit
 13 cards and the credit cards were, by design,
 14 not distinguishable. Visa and MasterCard,
 15 by design, did not allow people to know
 16 which were which.
 17 Q. Okay. Now, under the standard Member
 18 Agreement, Litle handled certain credit card
 19 transactions differently than others;
 20 correct? It was handled, Visa and
 21 MasterCard, one way, and American Express, a
 22 different way?
 23 A. Relative to the purchase part and the
 24 liability and where they were sent, yes.
 25 Q. Okay. How did Litle & Company know from the

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1 information it received from the merchant
 2 which type of card transaction it was?
 3 A. American Express starts with a 37 and is 15
 4 digits long -- I think it's 37. Visa starts
 5 with 1 4. MasterCard starts with a 5.
 6 Diners started with a 39 or something like
 7 that. I might not have these right, but we
 8 could tell the different brands based on
 9 the, what you call the identifier, but the
 10 credit card number and its construction.
 11 Within the Visa brand, we could not and were
 12 not allowed to have, and Visa did not
 13 divulge, any way to determine whether it was
 14 a credit card or a debit card until Wal-Mart
 15 won their battle royal suit and got Visa to
 16 pay them two billion dollars, or whatever
 17 they got them to pay, and that is what that
 18 suit was all about, because Visa and
 19 MasterCard did not distinguish them. The
 20 reason they didn't distinguish them is they
 21 collected interchange on credit cards and
 22 the interchange covered opportunity loss of
 23 interest that though didn't collect between
 24 the time they paid the merchant and the time
 25 they got it from the consumer, if there was

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1 a grace period, and debit cards were
 2 deducted directly from the consumer's
 3 account. So they made a lot more money on
 4 debit cards that they processed in the guise
 5 of credit cards. So they didn't want to
 6 give up on that profitability. That is what
 7 the Wal-Mart suit was all about. Visa and
 8 MasterCard both lost and it cost them a
 9 total of three billion dollars.
 10 Q. Were all the debit card transactions that
 11 Litle & Company handled debit cards that
 12 were linked to MasterCard and Visa in some
 13 way? Do you understand my question?
 14 A. That question makes no sense.
 15 Q. All right. Were there debit cards that were
 16 used at the time that were completely
 17 unconnected to MasterCard and Visa?
 18 A. Uh-huh. Like proprietary bank terminal
 19 cards?
 20 Q. Right. Let's take for example a Wells Fargo
 21 debit card.
 22 A. If it didn't have a Visa or a MasterCard
 23 number on the front of it, we didn't process
 24 it.
 25 Q. Okay. So Litle & Company would process only

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1 those debit cards that had Visa or
 2 MasterCard on them?
 3 A. Only Visa or MasterCard debit cards, yes.
 4 Q. Did Litle & Company create a document called
 5 an Operating Guide?
 6 MR. SMITH: Objection.
 7 A. The Operating Guide was part of the Master
 8 Member Agreement that never went anywhere,
 9 and so I don't remember whether we created
 10 the Operating Guide. I think there was an
 11 attempt to, but I don't know that it was
 12 used.
 13 Q. What was going to be the purpose of the
 14 operating guide?
 15 MR. SMITH: Objection. Calls for
 16 speculation.
 17 A. Remember the Master Agreement that you were
 18 talking about --
 19 Q. Right.
 20 A. -- was going to be one page and it was going
 21 to refer to the operating guide as sort of a
 22 giant appendix to the agreement, that these
 23 are the guidelines that the merchant had to
 24 follow. That was actually a fairly common
 25 way that payment processors wrote their

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1 agreements at the time. In fact, we were
2 basically copying what Chase did at the time
3 when Chase was our payment processor for our
4 catalog. Interestingly enough, Chase didn't
5 have any operating guide either, but we had
6 to comply with all the regulations in this
7 non-existent operating guide. I know just
8 by the look on your face you don't believe
9 that, but one of the wonderful regulations
10 that Visa/MasterCard have is you have to
11 comply with all the regulations of Visa and
12 MasterCard, and one of the first regulations
13 is merchants can't read or can't see the
14 regulations. Nobody believes it, but it's
15 true.

16 Q. Do you have a copy or maintain a copy of
17 Visa and MasterCard regulations?

18 A. Yes.

19 Q. And do you consult those regulations in your
20 business?

21 MR. SMITH: Objection.

22 A. Yes.

23 Q. Okay, and how often do you consult those
24 regulations?

25 A. We got a guy that knows them by heart. It's

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1 a stack of stuff that is a foot high.

2 Q. Okay, and at the old Litle & Company, did
3 you also maintain a copy of the
4 regulations?

5 A. Yes, but as a third-party processor, that
6 was okay. We just couldn't give them to our
7 merchants.

8 Q. Right, and so throughout the time that you
9 were at the old Litle & Company, you had a
10 company of the Visa and MasterCard
11 regulations?

12 A. As they were changed, which was with great
13 regularity.

14 Q. How often would those regulations be
15 changed?

16 A. At least once a year, and the way Visa
17 worked is -- the way the network worked is
18 they did the best job they could at figuring
19 out what the rules would be, and then when
20 they discovered things went wrong, they
21 changed the rules and came out with a new
22 set of regulations. One of the rules
23 changes we've talked about, and that is how
24 the funds got distributed to the merchants.

25 Q. How would you be informed of changes to the

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1 regulations?

2 A. We would get bulletins on a regular basis
3 from Visa and MasterCard if it was something
4 we should be alerted to and then we would
5 get a copy of the regulations every time
6 they came out.

7 Q. And who at the old Litle & Company was
8 responsible for insuring that Litle &
9 Company's operations were consistent with
10 the Visa and MasterCard regulations?

11 A. We had -- I forget what we called it then,
12 but basically, a compliance department, and
13 the compliance department kept up with those
14 thing, informed the merchants about changes
15 they had to make in -- when they changed,
16 and informed our systems people about when
17 we had to do compliance -- or systems work
18 to maintain compliance with the
19 regulations.

20 Q. Did you work with any attorneys at any point
21 at the old Litle & Company to review Visa
22 regulations and determine whether the
23 company was performing consistently with
24 them?

25 A. No. That was really our job and it seems to

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1 be beyond most attorneys to try and figure
2 that stuff out.

3 Q. When Litle & Company would come out with a
4 new program or service, was it typical that
5 someone at Litle & Company would review the
6 Visa and MasterCard regulations to insure
7 that that service was consistent with
8 regulations?

9 MR. GRAY: Objection.

10 MR. SMITH: Object to form.

11 THE WITNESS: Shall I answer?

12 MR. SMITH: If you understand the
13 question, you can answer.

14 A. We knew whether that new product or service
15 was either consistent or inconsistent with
16 the regulations. If it was consistent with
17 the regulations, that was fine. If it was
18 inconsistent with the regulations, and we
19 believed Visa should change the regulations,
20 then we would go and lobby Visa and get them
21 to change the regulations. In fact, I wrote
22 some of the Visa regulations on situations
23 like that where we got them to change the
24 regulations to accommodate the
25 card-not-present world, because the

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<p style="text-align: right;">Page 262</p> <p>1 regulations were all set up without any 2 anticipation that there would be a 3 card-not-present world. So the regulations 4 continue to change, continue to change based 5 on stuff -- big changes in the regulations 6 are because of all the credit card numbers 7 that have been compromised. Visa has 8 clamped down on security issues. That's the 9 kind of stuff. It was a continuing evolving 10 process. 11 Q. What sort of regulations did Visa or 12 MasterCard have concerning the 13 confidentiality of member information? 14 MR. SMITH: Objection. 15 MS. PRESTON: At some particular 16 point? 17 MR. SMITH: What time frame are we 18 talking about? 19 Q. This is during the early 1990's when you 20 were at the old Litle & Company. 21 MR. SMITH: He's already testified 22 that the regulations changed quite 23 frequently. I mean, if you want him to 24 answer as a broad generality, that's fine, 25 but it's --</p>	<p style="text-align: right;">Page 264</p> <p>1 lawyer that kept us honest and made sure we 2 remained ethical was a guy named Bob 3 Sherman, who works for your firm and you 4 probably know him, and I actually -- I was 5 involved in trying to get self-regulations 6 for the direct marketing industry to have 7 all of its transaction facilitators, of 8 which we were one type, to agree to keep 9 that data in confidence, and at that time, I 10 believe that allowing that data to float 11 around or not having any regulations around 12 that was bad. I thought that the companies 13 and major league companies who were 14 mis-using the data was unethical, and at the 15 present time, Gramm-Leach & Bliley now say 16 it's illegal and I was hoping, really, we 17 could avoid something like Gramm-Leach & 18 Bliley by self-regulation. So that's what 19 the confidential data was all about, and I 20 can go another three days on that subject, 21 but -- 22 Q. So the confidentiality provisions in the 23 Member Agreements at Litle & Company was 24 something that were different from 25 confidentiality provisions that might be in</p>
<p style="text-align: right;">Page 263</p> <p>1 A. That one, I can answer. A lot, because a 2 spent a lot of time on the privacy issues 3 for both the DMA and Visa and MasterCard. 4 In those days, there really wasn't a whole 5 lot involved with what a payment processor 6 could do with the data, and because we had 7 direct marketing companies whose data was 8 one of their primary assets of their 9 company, the idea that Visa and MasterCard 10 didn't think much of regulating the 11 confidentiality of that data was something 12 that we objected to pretty strongly. That's 13 one of the reasons that that confidentiality 14 section is in the Member Agreement. That 15 was a benefit to the members, telling them 16 that, unlike CitiCorp and all the rest of 17 these guys who are abusing their 18 confidential information, we wouldn't do 19 that. We understood the value of their 20 confidential information and we looked at 21 that as a sales feature of how we approached 22 the world. 23 In those days, I was on the Ethics 24 Committee of the DMA. In fact, I was 25 chairman of the Ethics Committee and the</p>	<p style="text-align: right;">Page 265</p> <p>1 other processors' Member Agreements? 2 MR. GRAY: Objection. 3 MR. SMITH: Objection. By "the 4 processors," the third-party processors? 5 MR. EDELMAN: Yes. 6 MR. SMITH: Objection. Calls for 7 speculation. I don't know how he would know 8 that. 9 A. I do know that and they were different and 10 we sold it as a feature of our service. 11 Q. That it was greater confidentiality? 12 A. Yes. 13 Q. During the early 1990's, who was Litle & 14 Company's primary competitor with respect to 15 processing for catalogers? 16 MR. SMITH: Objection. 17 Q. If it had one. 18 A. My first company. 19 Q. Which company that was? 20 A. DMGT. 21 Q. Do you know how DMGT handled confidentiality 22 of member information? 23 A. They didn't address it. 24 Q. Their Member Agreements were silent on that? 25 A. I believe so, yeah. It might have addressed</p>

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1 it, but it didn't address it as strongly as
 2 we did. Because they were our competition,
 3 we managed to make them look bad by
 4 explaining that.
 5 Q. Were there times when you were able to sign
 6 up members for Little & Company based upon
 7 the confidentiality provisions that you
 8 could offer?
 9 A. I can't say it was based on only the
 10 confidentiality agreements, but the fact
 11 that we were primarily direct marketers in
 12 the payment processing world and understood
 13 direct market issues, I would say, overall,
 14 is why we signed up a lot of customers and
 15 understanding that confidentiality that part
 16 of it, and actually, I testified in
 17 Washington, did all kinds of stuff about
 18 this on that subject.
 19 Q. You testified in Washington on
 20 confidentiality of processing information?
 21 A. Of confidentiality of information in the
 22 hands of transaction facilitators, which
 23 could be anybody with computers that had to
 24 have information of the kind that we had in
 25 our computers.

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1 Q. You made a reference to your former company,
 2 DMGT?
 3 A. Uh-huh.
 4 Q. Okay. When did you leave DMGT?
 5 A. 19 -- the end of 1985.
 6 Q. And what were the circumstances of your
 7 departure?
 8 A. I basically had a falling out with my
 9 partner. Primarily, interestingly enough,
 10 from my point of view anyway, over the
 11 confidentiality issue. He wasn't from the
 12 direct marketing industry, very bright,
 13 capable guy, but he thought a good revenue
 14 stream for us would be to actually use the
 15 data in our computers as if it were our own
 16 and I, at the time, was the chairman of the
 17 DMA's Ethics Operating Committee and
 18 figured, you know, this was not something I
 19 could sign up for, so we either had to do it
 20 my way or his way and we had some other
 21 issues, which in my view weren't all that
 22 significant, but -- so eventually, he
 23 decided he wanted to do it his way. He had
 24 control of the situation and I left.
 25 Q. Did you resign or were you fired?

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1 A. I was fired.
 2 Q. What was your position when you were fired?
 3 A. I was -- I don't really remember. I think I
 4 was president and CEO.
 5 Q. Did your disagreements with DMGT result in
 6 any legal claims?
 7 A. Yes.
 8 Q. Did you sue DMGT?
 9 A. Yes.
 10 Q. What were the claims?
 11 A. Oh, boy. I'm going to have to reconstruct
 12 it. The claims were because we had
 13 different entities involved in DMGT, and
 14 they weren't exactly owned the same way,
 15 what were my rights, et cetera. DMGT was a
 16 sub-chapter S corporation. We had agreed
 17 that any tax liability would be distributed
 18 to the sub-chapter S holders. I didn't get
 19 any distribution, so I had to pay taxes on
 20 income that I never saw, and it was that
 21 kind of stuff.
 22 MR. SMITH: I'm just going to --
 23 we're pretty far afield. So -- I mean, it's
 24 your time, but you know, we're going to do a
 25 hard stop if you're going to keep asking

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1 questions far afield like this. So I
 2 suggest you use your time to focus on
 3 stuff -- this is pretty far afield from
 4 what's relevant here today. If you feel
 5 otherwise, it's your time, but --
 6 Q. Okay. And did DMGT make any claims against
 7 you?
 8 MR. SMITH: Objection.
 9 Irrelevant. Calls for a legal conclusion,
 10 speculative.
 11 A. I don't remember. I didn't do anything
 12 wrong. I don't think they did, no. Maybe
 13 they did, but I don't remember.
 14 Q. So the claims that you asserted against
 15 DMGT, where did you assert those claims?
 16 A. Huh?
 17 Q. Where were those claims asserted that you
 18 brought against DMGT?
 19 MR. GRAY: Objection. Vague.
 20 MR. SMITH: Objection.
 21 Q. Where, is what I'm asking.
 22 MR. SMITH: What court --
 23 Q. What court?
 24 MR. SMITH: -- is what you're
 25 asking -- to the extent that you remember,

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<p style="text-align: right;">Page 270</p> <p>1 and I object to this whole line of</p> <p>2 questioning as irrelevant and beside the</p> <p>3 point?</p> <p>4 A. I was a resident of New Hampshire. DMGT was</p> <p>5 a New Hampshire company. So it was in</p> <p>6 New Hampshire.</p> <p>7 Q. And what was the outcome of the litigation</p> <p>8 with DMGT?</p> <p>9 MR. SMITH: Same objection.</p> <p>10 A. From whose point of view?</p> <p>11 Q. That's a good question to ask a lawyer. I'm</p> <p>12 just trying to find out what the outcome</p> <p>13 was, meaning, financial outcome, settlement</p> <p>14 terms, anything like that.</p> <p>15 MR. SMITH: To the extent that you</p> <p>16 recall a potential settlement agreement. I</p> <p>17 don't know if there was or not, but if you</p> <p>18 want to talk about it --</p> <p>19 A. I don't really remember. It dragged on and</p> <p>20 on and on and helped us get a foothold and</p> <p>21 compete. So I didn't look at it as that</p> <p>22 kind of lawsuit.</p> <p>23 Q. Did anybody end up having to pay any money?</p> <p>24 MR. SMITH: Objection.</p> <p>25 A. Yeah.</p>	<p style="text-align: right;">Page 272</p> <p>1 Q. Okay. Are you still -- do you still have</p> <p>2 any copies of any of the transcripts of any</p> <p>3 of your testimony in this case?</p> <p>4 MR. SMITH: Objection. Irrelevant</p> <p>5 and far from the scope of anything. If you</p> <p>6 know, off the top of your head, you can</p> <p>7 answer that. If it's something that might</p> <p>8 be kept in your attorney's office, then you</p> <p>9 shouldn't answer it.</p> <p>10 A. It might have been all thrown out. At one</p> <p>11 time, it was in this barn.</p> <p>12 Q. What other sorts of documents were in this</p> <p>13 barn?</p> <p>14 MR. SMITH: Objection.</p> <p>15 Q. Can you give me a general description --</p> <p>16 A. My homework papers from college. You</p> <p>17 know -- I go in it as little as possible,</p> <p>18 averaging maybe once a year.</p> <p>19 Q. Were you ever accused by DMGT of revealing</p> <p>20 confidential information?</p> <p>21 MR. SMITH: Objection.</p> <p>22 Irrelevant. Calls for a legal conclusion.</p> <p>23 A. I don't remember that being a part of</p> <p>24 anything.</p> <p>25 Q. Other than the litigation with DMGT, have</p>
<p style="text-align: right;">Page 271</p> <p>1 Q. Did DMGT pay any money to you?</p> <p>2 MR. SMITH: Objection.</p> <p>3 Irrelevant.</p> <p>4 A. Yeah.</p> <p>5 Q. And during this litigation, did you provide</p> <p>6 any testimony?</p> <p>7 MR. SMITH: Objection.</p> <p>8 Irrelevant. What kind of testimony?</p> <p>9 THE WITNESS: Do you want me to</p> <p>10 answer this stuff?</p> <p>11 MR. SMITH: You can answer stuff if</p> <p>12 you remember, but --</p> <p>13 THE WITNESS: I don't really care.</p> <p>14 A. Yeah, I did provide testimony.</p> <p>15 Q. Okay. Was that testimony by way or</p> <p>16 deposition or declaration?</p> <p>17 A. Name it it was everything.</p> <p>18 Q. Did it get to trial?</p> <p>19 A. Yeah.</p> <p>20 Q. And you testified at trial?</p> <p>21 MR. SMITH: Objection.</p> <p>22 A. It was not really a trial. It was a master</p> <p>23 arrangement which -- and I don't know what</p> <p>24 I'm talking about -- but it wasn't a formal</p> <p>25 trial.</p>	<p style="text-align: right;">Page 273</p> <p>1 you ever been involved in any other</p> <p>2 litigation?</p> <p>3 MR. SMITH: Objection. What do you</p> <p>4 mean? I mean, him as a person,</p> <p>5 individually?</p> <p>6 Q. Let's start with you, individually. Have</p> <p>7 you ever been a named party in any</p> <p>8 litigation?</p> <p>9 MR. SMITH: What is the relevance</p> <p>10 of this stuff? What are you looking for?</p> <p>11 MR. EDELMAN: You know what I'm</p> <p>12 looking for. You know exactly what I'm</p> <p>13 looking for.</p> <p>14 MR. SMITH: I don't see how it's</p> <p>15 relevant to what he's talking about today.</p> <p>16 MR. EDELMAN: Your advisory opinion</p> <p>17 is noted.</p> <p>18 Q. Can you answer the question?</p> <p>19 A. Can I answer the question? Yes.</p> <p>20 Q. How many different pieces of litigation?</p> <p>21 MR. SMITH: Objection. I object to</p> <p>22 the form of that question. What is a "piece</p> <p>23 of litigation"? I don't understand the term</p> <p>24 "piece of litigation." I'd recommend you</p> <p>25 seek clarification. I also don't understand</p>

<p style="text-align: right;">Page 274</p> <p>1 the term "involved." As a party, as a 2 witness; as a what? 3 A. Yeah. 4 MR. SMITH: Maybe you could restate 5 the question. He obviously doesn't 6 understand it. 7 A. Well, I was sued by a guy I invested in 8 because he claimed that, because my partner 9 and I weren't going to invest any more money 10 in him, that it diminished the value of his 11 stock, and therefore, we should be forced to 12 invest more money in him with no contractual 13 expectation. 14 Q. Was that suit filed while you were at 15 Litle & Company? 16 MR. SMITH: Objection. 17 Irrelevant. 18 A. No. It was afterwards. It was a frivolous 19 lawsuit. 20 MR. SMITH: Just answer his 21 questions yes or no. 22 Q. Did you ever get named as a defendant in any 23 lawsuit while you were at Litle & Company? 24 MR. SMITH: Objection. 25 Irrelevant. Answer yes or no.</p>	<p style="text-align: right;">Page 276</p> <p>1 at 5:04. 2 (Recess.) 3 THE VIDEOGRAPHER: On the record at 4 5:15. 5 Q. (Cont'd. By Mr. Edelman) Earlier, you made 6 reference to three-way agreements or 7 three-party agreements involving fulfillment 8 companies. Do you recall that? 9 A. Uh-huh. 10 Q. Do you still have possession of any of those 11 agreements? 12 A. I wouldn't. They would be in Paymentech's 13 hands. 14 Q. Okay. Do you know whether Paymentech was 15 asked to locate any of those three-party 16 agreements? 17 MR. SMITH: Objection. I object. 18 You can answer, if you know. 19 A. I don't think I asked them, so I don't know. 20 Q. Okay, and then you also had described 21 instances of which a bank could basically 22 direct Litle & Company to forward certain 23 payments to the bank. Does that sound 24 familiar to you? Hanover Direct, for 25 example.</p>
<p style="text-align: right;">Page 275</p> <p>1 A. As a defendant? 2 MR. SMITH: Him, in his personal 3 capacity? 4 MR. EDELMAN: Yes. 5 MR. SMITH: So he's not talking 6 about a lawsuit involving the company. 7 A. I don't think so. I might have been. I 8 mean, this is not something I have a 9 chronology that pops to mind. 10 Q. Did the old Litle & Company ever get sued? 11 MR. SMITH: Objection. Relevance. 12 A. I don't remember. It's not an uncommon 13 occurrence. 14 Q. Have you ever been criminally convicted? 15 A. No. 16 Q. Has the current Litle & Company been sued 17 for anything? 18 MR. SMITH: Objection. 19 Irrelevant. 20 MR. GRAY: Objection. Relevance. 21 A. I don't think so. Oh -- I don't know. 22 MR. EDELMAN: Let's take a break 23 for a few minutes. I'm going to see what I 24 need to wrap up. Okay? 25 THE VIDEOGRAPHER: Off the record</p>	<p style="text-align: right;">Page 277</p> <p>1 MR. SMITH: Objection. 2 A. Yeah. 3 Q. And there would be situations in which a 4 bank or institution such as Hanover would 5 tell you to forward certain payments to the 6 merchants bank? 7 MR. GRAY: Objection. 8 MR. SMITH: Objection to the form 9 of the question. If you understand, you can 10 answer it. 11 A. I understand the subject matter. I don't -- 12 the construction of the question doesn't 13 make any sense. 14 Q. Are you in in possession of any 15 documentation to indicate that Litle & 16 Company ever paid a third-party bank or 17 institution to pay off a loan that that bank 18 had provided to a merchant? 19 A. Do I have any of that documentation? No. 20 MR. SMITH: Objection. 21 Q. Would that be located at Paymentech? 22 A. Right. 23 Q. You also made a reference to a consultant 24 named Jim Alexander. 25 A. Uh-huh.</p>

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1 Q. And you think that is a consultant that may
 2 have told merchants about postage
 3 financing?
 4 A. It could have been Jim. It could have been
 5 his partner at the time. It could have been
 6 another consultant of a similar ilk, but
 7 most people knew what we did postage
 8 financing, and they would -- and these were
 9 guys that helped catalogs and financials in
 10 other matters. So yes, Jim would have been
 11 the kind of a person that would have told.
 12 Q. Okay, and was this a consultant that had a
 13 relationship with Litle & Company?
 14 A. Not a formal relationship, but we were
 15 friends.
 16 Q. Okay. Would Jim Alexander have any sort of
 17 contractual consulting relationship with the
 18 merchants?
 19 MR. SMITH: Objection.
 20 A. Could be. I wouldn't know, but -- might be
 21 an investment banking relationship.
 22 Q. Have you talked to Randy Bourne about this
 23 litigation?
 24 A. Yes.
 25 Q. Okay, and when did you talk to him?

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1 A. Probably not too long after I heard about
 2 it, because Exposures was the situation I
 3 remembered first.
 4 Q. Okay, and did you call up Mr. Bourne to ask
 5 him if he had any information?
 6 MR. SMITH: Objection.
 7 A. No. Actually, I called him up to suggest
 8 that maybe David would want to talk to him,
 9 and said "Hello, how are you doing?" I
 10 mean, we were friends, too.
 11 Q. Other than Mr. Bourne and Mr. Abbott, were
 12 there others at Exposures with whom Litle &
 13 Company communicated about the postage
 14 financing?
 15 A. I suppose they were, but that was the CEO
 16 and the CFO, so --
 17 Q. Okay, and was there one person at Litle &
 18 Company that would have general
 19 responsibility for the Exposures account?
 20 A. We had an account manager assigned to every
 21 account we had, and I don't remember who
 22 their account manager was.
 23 Q. So there would also --
 24 A. So the answer is yes.
 25 Q. And there also would have been an account

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1 manager assigned to the Museum Publications
 2 account?
 3 A. Yes.
 4 Q. Can you recall the name of anyone at Museum
 5 Publications that Litle & Company
 6 communicated with about postage finance,
 7 other than Mr. George?
 8 A. Maybe Gil Kemp, but he was a merchant. He
 9 wasn't a business type, so I'm sure if it
 10 didn't have anything to do with merchandise,
 11 he wouldn't remember it.
 12 Q. What position did Mr. Kemp have?
 13 A. He was the chief merchandiser.
 14 Q. Chief merchandiser for Museum Publications?
 15 A. Yes. It might not have been that title, but
 16 that was the function.
 17 Q. Okay, and was there any individual that you
 18 can recall at Hearthsong that Litle &
 19 Company communicated with about postage
 20 financing?
 21 A. Yes. Hearthsong was run by a husband and
 22 wife, and I don't remember their names, and
 23 I don't remember specifically which one of
 24 them was the primary contact, but Hearthsong
 25 was a catalog that was run by a husband and

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1 wife, which is not unusual in the catalog
 2 business.
 3 Q. Earlier today, you were talking about the
 4 different accounts that Litle & Company may
 5 have used in relation to this process. Is
 6 it correct that the account to which the
 7 Litle fees would be forwarded from First
 8 National would be different than the general
 9 account for a particular merchant?
 10 MR. SMITH: Objection.
 11 MR. GRAY: Objection.
 12 MR. SMITH: Do you understand the
 13 question?
 14 A. Can you rephrase the question?
 15 Q. Well, did -- was there sort of a general
 16 account, electronic account, that was set up
 17 for each merchant that Litle & Company did
 18 business with?
 19 MR. GRAY: Objection. Do you mean
 20 an account at Litle & Company?
 21 MR. EDELMAN: Yes.
 22 A. No.
 23 Q. When, typically, would you open an
 24 electronic account for the merchants?
 25 A. We wouldn't.

<p style="text-align: right;">Page 282</p> <p>1 Q. Who would open those accounts?</p> <p>2 A. The merchant.</p> <p>3 Q. Okay. So it was up to a merchant to open an</p> <p>4 account at a bank that the merchant wanted</p> <p>5 to use?</p> <p>6 A. And their money was either credited or</p> <p>7 debited to that account, as the case may be,</p> <p>8 in their bank. It was their money.</p> <p>9 Q. Okay, and would Litle & Company directly</p> <p>10 communicate with the member bank to do the</p> <p>11 crediting or debiting, or did it do that</p> <p>12 through First National?</p> <p>13 A. It did it through First National. When you</p> <p>14 issue a wiring instruction, all you need to</p> <p>15 know is the destination bank routing</p> <p>16 numbers, either whether it's a wire or ACH,</p> <p>17 and the money just shows up at the bank.</p> <p>18 The receiving bank doesn't have to do</p> <p>19 anything. We, obviously, advise the</p> <p>20 merchant through reporting that the money</p> <p>21 was going to show up there, so they would</p> <p>22 know they could spend it, I suppose.</p> <p>23 Q. Uh-huh, and when money came back to Litle &</p> <p>24 Company from First National, where did</p> <p>25 that -- what account did that money go to?</p>	<p style="text-align: right;">Page 284</p> <p>1 a general Litle & Company bank account. The</p> <p>2 management fees for the postage financing, I</p> <p>3 believe, was put into a different account.</p> <p>4 Q. Okay, and this different account for the</p> <p>5 fees for the postage financing, would there</p> <p>6 be a separate one of those accounts set up</p> <p>7 for each merchant?</p> <p>8 A. No.</p> <p>9 Q. Okay. So was there one account in which all</p> <p>10 the fees relating to the postage advance</p> <p>11 program were placed?</p> <p>12 A. I believe that was the case, and I don't</p> <p>13 know if that started right from the</p> <p>14 beginning or it evolved that way or what,</p> <p>15 but it was -- we looked at that as a</p> <p>16 separate product from our payment processing</p> <p>17 product, and so we segregated the money that</p> <p>18 way, is my memory.</p> <p>19 Q. Were fees from the general Litle bank</p> <p>20 account ever transferred to the management</p> <p>21 fees account relating to the postage</p> <p>22 program?</p> <p>23 A. I doubt it.</p> <p>24 Q. How about the reverse; were fees ever</p> <p>25 transferred or monies ever transferred from</p>
<p style="text-align: right;">Page 283</p> <p>1 Talking about the money coming in for the</p> <p>2 Litle fees.</p> <p>3 A. By account number, by account name. Either</p> <p>4 one, I wouldn't know.</p> <p>5 Q. Uh-huh. Would that be an account -- were</p> <p>6 the Litle fees for a merchant set up at a</p> <p>7 bank that was used by Litle & Company?</p> <p>8 A. Yes.</p> <p>9 Q. And so First National would forward a</p> <p>10 payment of the Litle fees to an account at</p> <p>11 Litle & Company's bank?</p> <p>12 A. Right.</p> <p>13 Q. All right, and were those fees set into a</p> <p>14 separate account only for a particular</p> <p>15 merchant, or were Litle fees for lots of</p> <p>16 different merchants put together on a single</p> <p>17 account?</p> <p>18 A. The latter.</p> <p>19 Q. Okay. Was there any segregation in the bank</p> <p>20 account for the Litle fees relating to any</p> <p>21 particular merchant?</p> <p>22 MR. GRAY: Objection. Vague and</p> <p>23 ambiguous.</p> <p>24 A. The fees for the normal payment processing</p> <p>25 business and the normal stuff was all put in</p>	<p style="text-align: right;">Page 285</p> <p>1 the postage management fee account to the</p> <p>2 general Litle bank account?</p> <p>3 A. It's possible. I don't know for sure.</p> <p>4 Q. So was there any separate bank account that</p> <p>5 would be designated as the Exposures postage</p> <p>6 advance account or something like that?</p> <p>7 A. No. It was looked at as a product and the</p> <p>8 Exposures advance account and anybody else's</p> <p>9 advance account would be run through that</p> <p>10 bank account as a separate product from the</p> <p>11 payment processing product.</p> <p>12 Q. Okay. So Litle & Company would get its 20</p> <p>13 percent, let's say, from First National</p> <p>14 relating to postage financing, and it would</p> <p>15 place that in its postage financing</p> <p>16 account --</p> <p>17 A. Yes, because --</p> <p>18 Q. -- and once it was placed in that account,</p> <p>19 it was co-mingled with all the other money</p> <p>20 that came in under the postage finance</p> <p>21 program?</p> <p>22 MR. GRAY: Objection.</p> <p>23 A. That's the way I remember it, yeah.</p> <p>24 Q. Okay. Did Litle & Company ever outsource</p> <p>25 any of its processing functions, other than</p>

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1 with respect to the entities you already
2 described in Little 10?
3 MR. SMITH: Objection.
4 MR. GRAY: Objection.
5 MR. SMITH: Do you understand the
6 question?
7 THE WITNESS: Yeah, I do, but I
8 don't --
9 A. Not that I can think of. Sometimes they
10 change, like NPC turned into First USA
11 later, but usually, we didn't have more than
12 one vendor for any specific task.
13 Q. Okay. So you think that the companies
14 listed in Little 10 are the universe of those
15 companies with whom Little & Company dealt in
16 the normal processing functions?
17 A. Or a substitute for those companies, as we
18 were able to negotiate better deals, or for
19 whatever reason.
20 MR. GRAY: Objection. Your
21 question wasn't limited in time, and he just
22 testified that the processors changed over
23 the course of time.
24 MR. EDELMAN: Okay. I'm going to
25 reserve my time. I think I'm done, unless

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1 something comes up in the last few minutes
2 of questioning.
3 REDIRECT EXAMINATION
4 by Mr. Gray:
5 Q. First, to follow up on some of these last
6 questions, the money that was deposited into
7 the postage financing account by FNBL, did
8 Little & Company then apply that money to
9 reduce the merchant's outstanding
10 obligation?
11 A. Yes, and actually, the advance came from
12 that account, too.
13 Q. I'm sorry. The advance came --
14 A. The advance would have come from that
15 account.
16 Q. Right.
17 A. So --
18 Q. The account at Little --
19 A. The advance -- the deficit from the advance
20 or the expense of the advance then got
21 reimbursed by the amount of money that came
22 back into that account --
23 Q. So --
24 A. -- plus our management fee.
25 Q. Did Little & Company finance all of these

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1 postage advance agreements itself?
2 A. Yes, we did. We looked into the idea of
3 getting somebody else to do it, but that's
4 when all the banks in Boston at the same
5 time blew up together and there wasn't
6 much -- it wasn't easy to do anything with
7 any banks because everybody was looking for
8 a job.
9 Q. Earlier, Mr. Edelman asked about Little &
10 Company's advertising and marketing
11 materials--
12 A. Uh-huh.
13 Q. -- in the time period 1985 to 1995, and you
14 testified, I believe, that you don't
15 remember whether the postage advance was
16 ever advertised in any of those materials;
17 is that correct?
18 A. Yeah.
19 Q. And why might Little & Company not have
20 advertised the postage advancing
21 arrangement?
22 A. Well, all the people that would have been
23 dealing, or at least the major people that
24 would have been dealing with the catalogs
25 knew about it, and we were financing it out

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1 of our own pocket, and we just didn't have
2 enough capital to satisfy. We didn't need
3 to advertise. We had all the business we
4 could handle, and also, when the postage
5 financing was required, it was all
6 fundamentally acquired at the same time. So
7 if we could have gotten people to avail
8 themselves of the service in some more
9 evenly-distributed way, we could have done a
10 lot more, but we had to pick and choose
11 between the people that we would provide the
12 postage financing to, and we, frankly, did
13 it based on, you know, just judgment call on
14 my part.
15 Q. So did merchants approach Little & Company
16 asking for postage financing arrangements
17 that Little & Company denied?
18 A. Yes.
19 Q. Did you, during the time period '86 to '95,
20 the old Little & Company, ever make any
21 effort to keep your general postage
22 financing procedures confidential?
23 A. No. In fact, we told the consultants and
24 the people that could provide us with that
25 business. We made it quite clear to them.

73 (Pages 286 to 289)

<p style="text-align: right;">Page 290</p> <p>1 Q. Did Litle & Company ever attempt to keep its 2 third-party payment procedures 3 confidential? 4 MR. EDELMAN: Objection. Vague and 5 ambiguous. 6 A. No. During our sales process, when we found 7 a merchant that could be benefitted by that, 8 we talked about it. 9 Q. Were there any NDA's in place when you 10 talked to these merchants about the 11 arrangement? 12 MR. SMITH: Objection. Do you 13 understand "NDA," non-disclosure agreement? 14 THE WITNESS: Sure. 15 A. Not that covered that, no. 16 Q. There was a lot of talk about 17 confidentiality and how Litle & Company 18 provided enhanced confidentiality for 19 particular pieces of information for its 20 merchants. 21 A. Right. 22 Q. And could you just describe the scope of 23 confidentiality you were discussing, if you 24 understand that question? 25 A. Yes. Mail order -- catalogs, in particular,</p>	<p style="text-align: right;">Page 292</p> <p>1 discuss one merchant's financial information 2 with another merchant. So maybe it applied 3 to that, too. I don't know. I'd have to 4 review it, but the reason we put the part 5 about confidentiality of data was, that was 6 a positive sales point that we made to 7 people we were trying to get to use us for 8 merchant processing. 9 MR. EDELMAN: I believe your three 10 and a half hours are up. 11 MR. GRAY: I believe, if the 12 witness is okay, I just have a couple more 13 minutes? 14 MR. SMITH: Sure. A couple more 15 minutes. 16 Q. Going back to Litle & Company's relationship 17 with FNBL, did FNBL ever forward any money 18 to a merchant or a third party without the 19 express instructions from Litle & Company to 20 do so? 21 MR. EDELMAN: Objection. Calls for 22 speculation. Vague and ambiguous. 23 MR. SMITH: Do you understand the 24 question? 25 THE WITNESS: Yeah.</p>
<p style="text-align: right;">Page 291</p> <p>1 have two major assets. One is their mailing 2 list, which are the people that buy from 3 them regularly, and the other is the history 4 of how the mailing list and products and 5 everything else worked. We had the mailing 6 list information on our computer. We had 7 that information, so if we wanted to, we 8 could take that information and rent it to 9 competing catalogs. Now, catalogs normally 10 render or exchange their list to people they 11 control and they get the revenue from that. 12 If we rendered and exchanged their mailing 13 list and we took the revenue from that, in 14 my view, that was tantamount to stealing 15 from our customers. So we didn't do it. 16 There were companies that definitely did, 17 CitiCorp being the primary example. 18 Q. The confidentiality provisions in Exhibit 4 19 of the Member Agreement, did those 20 confidentiality provisions apply only to 21 those customers lists and the customer 22 information that you've just described? 23 MR. EDELMAN: Objection. Calls for 24 a legal interpretation. 25 A. I can't remember. I know we wouldn't</p>	<p style="text-align: right;">Page 293</p> <p>1 A. I'm thinking about it. I can't imagine an 2 occasion when that would have happened. 3 Q. Typically then or in every occasion that you 4 can remember, any money that was forwarded 5 to anyone by FNBL that was processed by 6 Litle & Company was at the expressed 7 direction of Litle & Company? 8 MR. EDELMAN: Objection. 9 A. Yes. They would have no idea how to forward 10 money to anybody else or to anybody, for 11 that matter. They wouldn't have known how 12 to do that. 13 Q. Earlier, you mentioned that the separate 14 account to which the postage advance funds 15 were transferred from FNBL to Litle & 16 Company may have evolved over time? 17 A. Uh-huh. 18 Q. If that's the case, did it happen prior to 19 1995? 20 A. It would have, because I was gone after 21 1995. 22 Q. Roughly, how many customers did you have -- 23 how many merchants did you have between 1985 24 and 1995? 25 A. Well, it was pretty stable. We built it up</p>

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1 over the period of time and we had probably
 2 about a thousand at the end, and we
 3 obviously started with zero, so -- and we
 4 lost a few along the way. Some went out
 5 business. Some merged. Nothing
 6 particular -- some we threw out because they
 7 caused more problems than they were worth.
 8 I mean, typical payment processor kind of
 9 issues.
 10 Q. Roughly, how much business did Little &
 11 Company do per year?
 12 A. Measured how? There are three forms of
 13 measurement that people have. One is how
 14 many dollars were actually processed.
 15 Another one is, what was the gross revenue,
 16 which includes interchange. Another one was
 17 net revenue, which doesn't include
 18 interchange.
 19 Q. How many dollars were actually processed?
 20 A. Well, I really don't remember any of them,
 21 but it was well in the billions. I
 22 remember, one day, we processed half a
 23 billion dollars.
 24 Q. There were a couple of questions about a
 25 Master Membership Agreement.

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1 A. Uh-huh.
 2 Q. If you look at Exhibit 7 and 9, those are
 3 the promissory notes for Exposures and for
 4 Museum Publications.
 5 A. Yeah.
 6 Q. Each of those references a Master Membership
 7 Agreement or Master Member Agreement?
 8 A. Okay. Well, maybe that was in effect at
 9 that time. I don't know.
 10 Q. If it referenced those, then those did exist
 11 for those two companies?
 12 A. Yeah.
 13 MR. SMITH: Objection.
 14 MR. EDELMAN: Objection. Calls for
 15 speculation. Vague and ambiguous.
 16 A. The Member Agreement was a merger of the
 17 Master Member Agreement and the Operating
 18 Guide. I do remember that.
 19 Q. And in Exhibit 8, which is your Interoffice
 20 Memorandum, was that memorandum written
 21 prior to any cash advances or postage
 22 advances from Little & Company?
 23 A. Yes.
 24 Q. So it's a preliminary outline; is that
 25 correct?

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1 A. It's basically a communication to describe
 2 what I thought was a good idea.
 3 Q. And the promissory notes, Exhibits 7 and 9,
 4 are those the actual agreements for the
 5 postage advances to Exposures and Museum
 6 Publications?
 7 A. Yes.
 8 MR. SMITH: Objection.
 9 Q. Last question. You mentioned that you
 10 processed the mop info-mercial
 11 transactions. Can you think of any other
 12 examples of info-mercial products?
 13 A. Oh, there were all kinds ThighMaster, there
 14 was the Chinese hammered wok, and the kind
 15 of stuff we do for payment processors was
 16 the factory in China used manual labor and
 17 balpene hammers to make these woks, and then
 18 the entrepreneur in China figured out how to
 19 automate it, and they came through and there
 20 were no imperfections at all, and they were
 21 selling hand-hammered Chinese woks. "Now,
 22 what do we do with all these woks?" I
 23 remember getting in that conversation. They
 24 actually took the woks and lined them up at
 25 the end of the warehouse and took shotguns

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1 and shot at them. Let's see. They were all
 2 kinds of stuff. A lot of the exercise
 3 stuff. The Ginsu knives. Everybody
 4 remembers that one. We did about 95 percent
 5 of all info-mercials, and that's the
 6 late-night television stuff you see, and a
 7 lot of health equipment. NordicTrack. We
 8 did all the NordicTrack stuff.
 9 Q. Could you explain what a ThighMaster is?
 10 A. From personal experience or based on what I
 11 know? What's her name, Somers? A
 12 ThighMaster is a product -- an info-mercial
 13 company gets a product that they think they
 14 can sell, and then they develop the
 15 advertising, the television commercials, and
 16 they recruit the people to be on the
 17 television commercial. Lots of times, they
 18 have a celebrity. Chuck Norris is doing
 19 Total Gym now, for example, and a lot of
 20 times they have a celebrity, and what's her
 21 name, Somers --
 22 Q. Suzanne Somers?
 23 A. -- did the ThighMaster and it was a pretty
 24 successful product. BowFlex, people have
 25 seen that. It goes on and on and on, and

75 (Pages 294 to 297)

<p style="text-align: right;">Page 298</p> <p>1 usually, there are a few companies, like</p> <p>2 Guthy Ranker -- we did all of Guthy Ranker's</p> <p>3 stuff -- that finds people with products and</p> <p>4 organizes the whole thing and figures out</p> <p>5 how to do the advertising and has deals with</p> <p>6 television stations, so they could get</p> <p>7 highly discounted advertising, and they know</p> <p>8 how to deal with all the metrics and which</p> <p>9 television channels and which times are</p> <p>10 going to be most efficient for selling some</p> <p>11 kind of product. The ThighMaster was just</p> <p>12 one of those.</p> <p>13 Q. How many of info-mercial products use</p> <p>14 fulfillment centers?</p> <p>15 A. Actually, most companies use third-party</p> <p>16 fulfillment centers. That was true in the</p> <p>17 past and it's true now because the people</p> <p>18 that do info-mercials are typically sort of</p> <p>19 hot-shot merchandisers with a good idea and</p> <p>20 generally not much business experience.</p> <p>21 MR. EDELMAN: All right, you guys</p> <p>22 are way, way over.</p> <p>23 Q. Okay. In each of those situations, was the</p> <p>24 situation similar to the mop example you</p> <p>25 testified about earlier?</p>	<p style="text-align: right;">Page 300</p> <p>1 response curve and the Visa/MasterCard curve</p> <p>2 for how many dollars would be coming in</p> <p>3 after the catalog was mailed. We determined</p> <p>4 the percentage we would take out, and then</p> <p>5 we had two methods of doing it, as I</p> <p>6 remember. We would either take out that</p> <p>7 fixed amount for a period of time that was</p> <p>8 calculated based on the projections, or we'd</p> <p>9 take out the actual amount that came in and</p> <p>10 calculate a percentage on it. So we'd set</p> <p>11 up the process before the money was even</p> <p>12 advanced and then we, based on what the</p> <p>13 process was, if in fact we took a percentage</p> <p>14 of the amount out, we looked that day at</p> <p>15 what the amount that came in was and took</p> <p>16 the percentage that we agreed to ahead of</p> <p>17 time.</p> <p>18 Q. Right, but when you were going through the</p> <p>19 process of taking a percentage, you would do</p> <p>20 that providing the instructions or</p> <p>21 calculations to First National; correct?</p> <p>22 A. Instructions, yeah, based on the way we</p> <p>23 refund money.</p> <p>24 Q. All right. By the time the money came back</p> <p>25 to you for that amount from First National,</p>
<p style="text-align: right;">Page 299</p> <p>1 A. Yes.</p> <p>2 Q. In the sense that Litle & Company would</p> <p>3 direct FNBL to pay a portion of the credit</p> <p>4 card payments that would otherwise be due</p> <p>5 the catalog company to the fulfillment</p> <p>6 center?</p> <p>7 A. Only in those cases where we set up those</p> <p>8 three-way agreements. We didn't do that</p> <p>9 with all of them.</p> <p>10 MR. GRAY: Thank you.</p> <p>11 RECROSS-EXAMINATION</p> <p>12 by Mr. Edelman:</p> <p>13 Q. I just have a brief few questions and then</p> <p>14 we'll be done. You were asked a question</p> <p>15 about the application of the 20 percent</p> <p>16 under the Exposures agreement to the bank</p> <p>17 accounts, merchant accounts. When was it in</p> <p>18 the process that Litle & Company would</p> <p>19 actually calculate what amount was going to</p> <p>20 be applied to the outstanding advance to</p> <p>21 Exposures?</p> <p>22 A. While we were setting up that cycle of</p> <p>23 advance --</p> <p>24 Q. Right.</p> <p>25 A. -- we would determine the schedule, the</p>	<p style="text-align: right;">Page 301</p> <p>1 you didn't segregate that amount of money at</p> <p>2 that time; you just put it into an account</p> <p>3 with all the other postage advance money?</p> <p>4 MR. SMITH: Objection.</p> <p>5 A. No.</p> <p>6 Q. So explain to me then how would you deal</p> <p>7 with the money when it came back.</p> <p>8 A. We waited until the money came back, and</p> <p>9 then we directed most of the money, the,</p> <p>10 say, 75 or 80 percent to the merchant, paid</p> <p>11 it out the way we normally would have paid</p> <p>12 out a hundred percent, and at exactly the</p> <p>13 same time, we paid out the amount that was</p> <p>14 deducted from what the merchant got to</p> <p>15 whoever the third party was, to our bank</p> <p>16 account, whatever. That was when the money</p> <p>17 came back.</p> <p>18 Q. Right, but I'm talking about after the money</p> <p>19 comes into First National. First National</p> <p>20 needs to know what to do with the money.</p> <p>21 A. Right.</p> <p>22 Q. Okay. When you instruct First National and</p> <p>23 say "Provide a payment to us, Litle &</p> <p>24 Company, for the 20 percent" --</p> <p>25 A. Uh-huh.</p>

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1 Q. -- when you get that 20 percent from First
 2 National Bank, that money is then taken and
 3 put into a general postage advance account;
 4 it's not segregated for each particular
 5 merchant; correct?
 6 A. That's right, except First National Bank, I
 7 believe it wired that money directly to our
 8 postage account.
 9 Q. Correct.
 10 A. They didn't wire it to some other account
 11 and we transferred it. They wired it to the
 12 postage account.
 13 Q. You referenced the fact that companies had
 14 asked Litle & Company to do the postage
 15 advance and Litle & Company turned them
 16 down?
 17 A. True.
 18 Q. Can you identify any of those companies?
 19 A. No. I can identify them by nature.
 20 Generally, they were down the shoot so far
 21 that nobody would have touched them, or else
 22 we had already used our limit of the capital
 23 that we had during that time period.
 24 Q. You can't identify anybody by name?
 25 A. No.

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1 MR. EDELMAN: Okay. Thank you.
 2 MR. SMITH: We'll read and sign.
 3 Someone is going to provide us with a copy,
 4 with exhibits. All right.
 5 THE VIDEOGRAPHER: The time is
 6 5:47. The deposition is concluded. This is
 7 the end of Cassette 4. We are off the
 8 record.

(The Deposition was closed at
 5:47 p.m.)

THOMAS J. LITLE, IV

Subscribed and sworn to before me
 this ____ day of _____, 2006.

(Notary Public) My Commission Expires:

Page 304

1 DEPONENT'S ERRATA SHEET
 2 AND SIGNATURE INSTRUCTIONS
 3 The original of the Errata Sheet
 4 has been delivered to Atty. Gray.
 5 When the Errata Sheet has been
 6 completed by the deponent and signed, a copy
 7 thereof should be delivered to each party of
 8 record and the ORIGINAL delivered to Atty.
 9 Gray, to whom the original deposition
 10 transcript was delivered.

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Page 305

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 2 CASE: ADVANCEME, INC.
 3 vs. RAPIDPAY, LLC, et als.
 4 and ADVANCEME, INC.
 5 vs. AMERIMERCHANT, LLC

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I have read the foregoing
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THOMAS J. LITLE, IV DATE

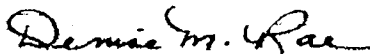
1 COMMONWEALTH OF MASSACHUSETTS

2 MIDDLESEX, SS.

3
4 I, Denise M. Rae, a Certified
5 Shorthand Reporter and Notary Public duly
6 Case 6:06-cv-00082-LED-JDL Document 74 Filed 11/02/2006 Page 79 of 79
7 commissioned and qualified within and for
8 the Commonwealth of Massachusetts, do hereby
9 certify:

10 That THOMAS J. LITTLE, IV, the
11 witness whose deposition is hereinbefore set
12 forth, was duly sworn by me, and that such
13 deposition is a true record of the testimony
14 given by the witness to the best of my
15 skill, knowledge, and ability.

16 IN WITNESS WHEREOF, I have hereunto
17 set my hand and my affixed notarial seal
18 this 8th day of September, 2006.

19 

20 -----
21 Denise M. Rae

22 Notary Public

23 My commission expires:

24 January 16, 2009
25